THE CENTRAL LAW JOURNAL.

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, MAY 19, 1876. { Hon. JOHN F. DILLON Contributing Editor.

Current Topics.

ADJOURMENT OF THE UNITED STATES SUPREME COURT.—On the 8th of May, the supreme court adjourned until next term. During the sittings of the court the present term, opinions have been delivered in two hundred and six cases. Three hundred and thirty cases in all have been disposed of, which leaves remaining on the docket of the court, nine hundred and seventy-five. The Granger cases, involving the question of the rights of the states to fix the tariff of rates to be charged by railroads and other corporations within their limits, were not decided. Among the other cases of importance which are left over, are the New York Mutual Insurance Company cases, involving the question of the effect of the war upon contracts of insurance, between northern companies and southern policy holders.

INTERNATIONAL COPYRIGHT AGAIN.—We should not recur to this subject at this time, but for an article in the *Washington Law Reporter* of May 6, which is an evident attempt to turn the matter into a personal controversy. The editor of the *Reporter* charges Judge Dillon with having been the author of the article in question, without having the slightest information as to who was the author of it. He asserts a resemblance between the style in which that article was written, and what he terms Judge Dillon's "speeches to the jury in some minor whiskey fraud case." Concerning this we have to say: 1. That judge has never tried any "minor whiskey fraud case;" 2. That the editor of the *Washington Law Reporter* has never seen a charge of his to the jury in any such case; 3. That there is no resemblance between the style of that article and the style of Judge Dillon's charges to juries in any case; 4. That Judge Dillon did not write the article in question, and never was consulted about it, and never saw it or heard of it before it was published; 5. That Judge Dillon does not write any editorial matter in this journal, except over his initials, and is not in the remotest degree responsible for opinions expressed in its editorial columns, any more than Bayard Taylor is responsible for the editorials which appear in the *New York Tribune*. This attempt to get up a personal controversy, and drag an innocent third party into it, that innocent third party being a judge on the bench, who, from the nature of his position, is precluded from replying or even explaining, is an extremely low and mean thing. In our previous article we convicted the editor of the *Washington Law Reporter* of voluntarily engaging in the defence of stealing; we have now convicted him of disingenuous trickery. And having done this, we are done with the editor of the *Washington Law Reporter*.

We do not for a moment admit, however, that, in the article alluded to, we used any exaggerated language. We are not in the habit of using such language. With us, stealing is stealing, and the man who steals is a thief; and stealing is none the less stealing because there is no law against it; and it is just as bad to steal from an Englishman or a Frenchman as to steal from an American. We did not, as the *Washington Law Reporter* asserts, compare any American publisher to "Claude Duvals," and "Dick Turpins," and "pirates." We said that those of them who follow the present system of plundering foreign authors, were worse than the Claude Duvals, Dick Turpins and pirates of history; for these latter at times discriminated as to the circumstances of their victims, and showed mercy; whereas, the mercy of the literary wrecker is the mercy of the wolf for the lamb. "It is easier," said Papinian to the emissaries of Caracalla, "to commit, than to justify, fraticide." He died for saying it, but the truth lives. It is easier to commit, than to justify, larceny—and, in our judgment, a great deal more honorable.

ADMINISTRATION OF ESTATES—RIGHT OF RETAINER.—Perkins v. Perkins is a late decision in the Supreme Court of Rhode Island, on the common law remedy of retainer. It was an action of assumpsit to recover for services performed, and for care, provisions, and clothing furnished by the plaintiff to Jacob Perkins and his wife, during the life-time of said Jacob. The plaintiff was administratrix of the estate, and commenced the action by service of the writ on herself as such. She declared against herself as administratrix. A plea in abatement was filed by one Lockwood, setting forth that he had been appointed administrator, in the place of the plaintiff, who had resigned, and praying that the writ might abate, for the reason that the plaintiff and defendant named were the same person. The plaintiff, by way of justification, pleaded that the estate was insolvent; commissioners were appointed, and her claim was submitted to them, and was by them rejected. A statute provided that any creditor, whose claim may be rejected, may have the same determined at common law, in case notice be given to the clerk of probate within forty days, and action be brought within sixty days, after the report of the commissioners shall have been received. She urged that she had no alternative but to commence the action against herself, because if she had waited for the appointment of an administrator after the report was received, she would have lost her right of action under the statute by her delay. The court sustained the plea in abatement, holding that it was not necessary for her to have delayed resigning until the report was received. She might have resigned as soon as she knew the estate was insolvent, and she would have to submit her claim to the adjudication of the commissioners. The plaintiff did not cite any case to show that the action could be maintained. Such a remedy is unknown at common law. Retainer is the common law remedy. Blackstone, says: "If a person indebted to another makes his creditor his executor, or if such creditor obtains letters of administration to his debtor; in these cases the law gives him a remedy for his debt by allowing him to *retain* so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by the mere act of law, and is grounded on this reason: that the executor can not, without an apparent absurdity, commence a suit against himself, as a representative of the deceased, to recover that which is due to him in his own private capacity; but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be in a worse condition than all the rest of the world besides." 3 Bl. Com. 18.

THE COMPLETION OF A TRUST.—The above court has also decided a case, (Ray v. Simmons, Administrator), as to what is, or is not, the completion of a trust. The case in judgment was as follows: One Levi Bosworth made a deposit in a bank, the account contained in the bank book which was furnished to him being headed as follows, to-wit: "Dr. Fall River Savings bank, in account with Levi Bosworth, trustee for Marianna Ray, Prov. Cr." The first deposit of $184 was credited as

cash, under the date of April 6, 1868. The account was also credited with cash, October 31, 1868, $50, and January 8, 1872, $70, and with divers dividends. All the dividends were credited as they accrued, except one of $25.66, which was paid to Bosworth, October 12, 1870. And this was the only money withdrawn from the deposit by him previous to his death, which occurred September 15, 1872. The plaintiff was a step-daughter of the deceased. She lived in his family, he having no children. Bosworth brought the book home and threw it in the plaintiff's lap. The plaintiff opened and read it, and said she was much obliged for the present. It was then put away in a box, but was afterwards carried by him to Fall River three times to have the interest entered, and again given to plaintiff when he returned. This suit was brought against the administrator for the amount of the deposits. The defendant contended that the plaintiff was not entitled to relief, because there was no effectual trust, inasmuch as Bosworth, by retaining the book, always kept and intended to keep control over the deposit for his own use, and did in fact so control it by receiving the dividend which was paid to him October 12, 1870. But the court thought the trust complete. Bosworth deposited the money as trustee, the bank credited to him both the money and the dividends as such. He moreover gave the book to plaintiff and told her that he had made the deposit for her. All was done which the plaintiff could ask, unless she desired to have the money paid or transferred to her, which would be not constituting the trust, but discharging it. When the trust is voluntary, courts of equity do not enforce it, so long as it remains inchoate or incomplete; but when once the trust has been constituted, they do not refuse relief because it is voluntary. Stone *et al.* v. King *et als.*, 7 R. I. 358. A person need use no particular form of words to create a trust, or to make himself a trustee. It is enough if, having the property, he conveys it to another in trust, or, the property being personal, if he unequivocally declares, either orally or in writing, that he holds it *in præsenti* in trust, or as a trustee for another. *Ex parte* Pye, 18 Ves. Jr. 140; Milroy v. Lord, 4 De G. F. & J. 264; Richardson v. Richardson, L. R. 3 Eq. 686; Kekewich v. Manning, 1 De G. M. & G. 176; Morgan v. Malleson, L. R. 10 Eq. 475; Penfold v. Mould, L. R. 4 Eq. 562; Wheatley v. Purr, 1 Keen, 551, and note; McFadden v. Jenkyns, 1 Hare, 458; affirmed on appeal, 1 Phillips, 153; Thorpe v. Owen, 5 Beav. 224. And the creation of the trust, if otherwise unequivocal, is not affected by the settlor's retention of the instrument of trust, especially where he is himself the trustee. Exton v. Scott, 6 Sim. 31; Fletcher v. Fletcher, 4 Hare, 67; Carson's Adm'r v. Phelps, 14 Am. Law Reg. N. S. 100; Souverbye *et ux.* v. Arden *et als.*, 1 Johns. Ch. 240; Bunn v. Winthrop *et als.*, 1 Johns. Ch. 329; Wheatley v. Purr, 1 Keen, 551; Millspaugh v. Putnam, 16 Ab. Pr. 380; Howard, Adm'r v. Savings Bank, 40 Vt. 597. And, see, Brabrook v. Boston Five Cents Saving Bank, 104 Mass. 228; Clark v. Clark, 108 Mass. 522.

RIGHT TO COMPENSATION OF ONE WHO IS AGENT FOR BOTH PARTIES IN EFFECTING A SALE.—An interesting question, viz: The remuneration which an agent is entitled to, who negotiates a sale between two parties, he being at the same time the agent of both, is decided by the same court in Lynch v. Fallon. The plaintiff brought suit for commissions on an exchange of real estate belonging to the defendant on the one side, and to the West Elmwood Land Company of Providence, on the other side. The plaintiff proved an express promise by the defendant to pay him the commissions. The defendant contended that it was not binding on him, the plaintiff having been previously employed by the land company to sell their land, and being in their employ throughout the transaction. The court gave judgment for the defendant with costs. Duefee, C. J.: "In the case at bar, we do not find that the West Elmwood Land Company was informed by the plaintiff of his employment by the defendant. The representatives of the company continued to confer freely with him, and raised the price of their land, which they held at $50,000, and which they had previously offered through the plaintiff at fifteen cents a foot, to twenty-five cents a foot, so as to bring it up to or near the price which the defendant had put upon his estate. The plaintiff, for anything that appears, co-operated in this; he says he told the defendant it was a nice piece of land, good to build on; he does not say he ever told the defendant that the price was enormously inflated. The case shows how easy it is for an agent of both parties to become, either consciously or unconsciously, a mere instrument in the hands of the more adroit and sharp-witted party in hoodwinking the other and decoying him into a disadvantageous bargain. It indicates what temptations and facilities such a double agency presents for unconscionable concealments and misrepresentations, and how dangerous it would be, even if it were exercised with the consent of both parties; and certainly, without such consent, freely and fully given, the law ought not to tolerate it for a moment." A person may be entitled to pay from both parties to a sale or exchange, where he acts merely as a middleman to bring them together. Rupp v. Sampson *et al.* 16, Gray, 398; Seigel v. Gould, 7 Lans. 177. But he can not serve as agent or broker for both, on account of the conflict between his interest and duty. The claim to charge commissions to both parties is so unreasonable that it can not be justified by any custom or usage. Farnsworth v. Hemmer, 1 Allen, 494; Walker v. Osgood, 98 Mass. 348; Pugsley v. Murray, 4 E. D. Smith, 158: Everhart v. Searle, 71 Pa. St. 256; Raisin v. Clark, 41 Md. 158; Schwartze v. Yearly, 31 Md. 270; Morison v. Thompson, L. R. 9 Q. B. 480. In Pugsley v. Murray, 4 E. D. Smith, 245, it is said that the rule only applies where the broker conceals the double employment; but the other cases rest the invalidity of the contract on grounds of public policy. In Raisin v. Clark, 41 Md. 158, it was held that the broker could not recover of the party who last employed him, even though the double employment was known to both parties, and the party who first employed him had paid his commission. And see Story on Agency, §§ 210, 211.

MAKING EVIDENCE IN COURT.—A prisoner is not required to make evidence against himself. Such is the judgment of the Supreme Court of Tennessee in Stokes v. The State. The prisoner was indicted for the murder of a woman who was taken from her house at night, carried some distance and hung to what the witnesses termed a "hog pole." Near where she was hung, a track was found, and the impression of a bare foot in the mud. On the trial, the state brought a pan of mud into court, and, having placed it in front of the jury, asked a witness if the mud in the pan was about as soft as the mud near the "hog pole." The witness replied that it was. The attorney-general having the soft mud all right, now only required a corresponding foot-print. He therefore kindly invited the prisoner to try the experiment. But Stokes seemed to be rather averse to taking this share of the prosecution, thinking, very likely, that he had quite enough on his hands in attending to his side of the case, and on the judge telling him he could not be forced to do so, politely declined the invitation. Then another witness was asked if he saw the pan of mud, and if he saw any track in it. He answered that he did not; but he must have been mistaken, for the decision of the supreme court shows that before this question was asked, the attorney-general had already "put his foot in it," and so deeply, that, when they pulled it out, the verdict of the jury came out with it. The court by Lea, special J.,

says: "Because of this action of the attorney-general, and the assent of the court thereto, this cause is reversed and remanded. In the presence of the jury the prisoner is asked to make evidence against himself. The court should not have permitted the pan of mud to have been brought before the jury, and the defendant asked to put his foot in it. We are satisfied the jury was improperly influenced thereby. And it is no sufficient answer, that the judge afterwards told the jury that the refusal to put his foot in the mud was not to be taken as evidence against him. The bringing in of the pan of mud, and the request of the attorney-general, was improper, and should not have been permitted by the court. We greatly deprecate the practice into which some circuit judges have fallen, of permitting incompetent and illegal testimony to be placed before the jury, and afterwards, at the close of the case, withdrawing it, and telling the jury not to be influenced thereby. Such testimony should be promptly rejected,and not permitted to go to the jury at all; for jurors, with minds untrained to legal investigations and discriminations, are sometimes likely to be influenced thereby,although such incompetent evidence may be afterwards withdrawn."

ADMISSION TO THE BAR—JURISDICTION OF COURTS.—Mr. O. Mosness, a lawyer of Chicago, having applied to the Supreme Court of Wisconsin for admission to the bar of that state, has been unsuccessful, the court refusing to grant a license, on account of the applicant being a non-resident. The opinion of the court was delivered by Ryan, C. J. In the opinion of the learned judge, the office of attorney and counselor of the court, being one of official trust, should be subject to the strict oversight and summary power of the court. It would, he considers, be dangerous to the administration of justice, that such an office should be filled by persons residing beyond the jurisdiction of the court, and practically not subject to its authority. He most properly assumes that members of the bar of Wisconsin lose their right to practice there, by removing from that state. There is force and reason in this, as also in his conclusion, "Our courts can not have a non-resident bar." But it seems there is a statute in the state which, it is claimed, is commandatory on the court to admit a non-resident when properly qualified. The learned chief justice in passing upon this branch of the argument, takes the same grounds which he maintained in his judgment on the application of Miss Goddell, which came before him some months ago, and which he denied, though on other grounds. It is, that while the constitution has established courts, amongst which it has distributed all the equity and common law jurisdiction of Wesminister Hall, it has made no express provision for the bar. It vests in the courts the judicial power of the state, and with this must go the power to establish a bar to practice in them. As the admission to the bar is a judicial power, the court therefore entertained the opinion that it became a very grave question for adjudication, whether the constitution does not entrust the rule of admission to the bar, as well as of expulsion from it, exclusively to the discretion of the courts. A decision such as this would consequently declare a statute unconstitutional which conflicted with the opinion of the court as to the admissibility of a particular class of persons. But the learned judge in this case does not consider that the section of the statute on which the applicant relied, was intended to do more than to authorize the appearance of non-resident counsel in the trial and argument of causes. As the court has always extended this courtesy, the statute was unnecessary; if it intended to do more, it was *ultra vires*.

We do not deem it necessary in commenting upon this case, at the present time, to discuss the question relative to the right of the legislatures and courts over the members of the bar. We would simply say that, in our opinion, what the Supreme Court of Wisconsin considers its jurisdiction, would, if upheld, tend greatly to raise the standard and *personnel* of its officers. In the columns of one of our contemporaries the judgment is severely attacked by a correspondent and the indecent motive is imputed to the court of having decided the case as a warning that, should an act providing for the admission of women be passed by the legislature, it will be disregarded. Such an imputation is hardly worthy of notice. In the lady's case, the court, on the question of jurisdiction, used even stronger language than in the case under consideration. And further than this, the weighty and convincing reasons which the chief justice there advanced, would, we should say, be much more effectual against the passage of such a law in Wisconsin, than even a judicial threat.

LIFE INSURANCE—FORFEITURE OF POLICY FOR NON-PAYMENT OF INTEREST ON LOAN NOTES.—In the case of Hull v. Northwestern Mutual Life Insurance Company, the Supreme Court of Wisconsin has delivered an opinion with reference to a question which has been frequently discussed in these columns. See Russum v. St. Louis Mutual Life Insurance Co., *ante*, p. 275. The following is a synopsis of the case: 1. A policy of a life insurance recites that in consideration of the annual premium therein stipulated, consisting of an annual cash premium, and on an annual loan note, with interest, to be paid and given during ten years next after the date of the policy, the company assured the life of plaintiff's intestate to a certain amount for the term of his natural life. It declares that at each distribution of the surplus after its date, a due proportion of such surplus on each year's business during the continuance of the policy will be returned to the assured, and that if default shall be made in the payment of any premium, the company will pay as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default; but that in order to secure such proportion of the policy, "all premium notes must be taken up, or the interest thereon be paid annually in cash, on the date of the annual maturity of the premium or within three months thereafter until the notes are cancelled by returns of the surplus, or the whole policy will be forfeited, unless one or more annual payments have been made in full, by cash payment or by application of the dividend." One of the conditions of the policy was, that if the premiums, or the interest upon any note given therefor, should not be paid on the day named for their payment, "the company should not be liable for the payment of the whole sum assured, but only upon such part thereof as is stipulated above," and the remainder should cease and determine. There was endorsed on the policy this statement: "At the third annual renewal, the dividend of the first year will be due, and on the cash policies can be applied as cash towards the payment of the third year's premium * * * and on note policies will be applied first to pay the unpaid interest on the loan notes, and then to the notes themselves. * * * This policy is non-forfeitable. Each complete yearly payment secures its proportion of the policy." The loan note contains a promise by the assured to pay the amount therein named with interest, "which interest shall be paid annually or the policy be forfeited." The assured paid the cash premiums for three years, and gave in each of said years his annual loan note as required, but afterwards made default in a payment due September 29, 1873, by reason of which the policy is admitted to have lapsed as to seven-tenths of its amount. On the 29th of March, 1874, there was due the company as interest on outstanding loan notes, $24.80; but on the same day there was due the assured from the company $51.15, dividend earned for the year 1872. The assured

died December 14, 1874. *Held*, that the company is liable to pay to the administrator three-tenths of the amount insured. 2. Forfeitures are only enforced when it appears that this is the plain intent and meaning of the contract; and the words of a policy must be construed most strongly against the insurer; and if the policy contains repugnant conditions, the court must enforce those which are in favor of the assured and will prevent a forfeiture. 3. By the terms of the policy, the assured was clearly entitled to have the dividend which fell due on the day when interest accrued on his loan note, applied first to the payment of such interest; and even if a forfeiture should have resulted on the failure to pay such interest (a point not decided) there was none in the case. 4. Dividends due the insured are cash, and there is nothing in the policy which justifies the company in refusing to apply them in payment of interest on premium notes in such cases.

Divorce—Answer Praying Relief—Default.

FICKE v. FICKE.

Supreme Court of Missouri, January Term, 1876.

Present, Hon. DAVID WAGNER, " WM. B. NAPTON, " T. A. SHERWOOD, " WARWICK HOUGH, } Judges.

Under the divorce act where the answer of the defendant prays relief, a default may be taken against the plaintiff, and a decree of divorce granted.

The opinion of the court was delivered by Napton, J.

This was a petition by the wife for a divorce from her husband, on various grounds.

The answer denied all the allegations of the petition, and alleging various statutory causes, asked a divorce on his part. A replication was filed and the case was set for trial. The plaintiff not appearing, but the defendant appeared and answered to the cause, and the court proceeded to hear the proofs offered by defendant, and having first dismissed the plaintiff's petition, gave a judgment and decree of divorce for the defendant, on his cross-bill. On the following day of the term, the plaintiff moved for a new trial, on the ground that the court erred in hearing the cause on the petition and answer, and in permitting the trial to proceed in the absence of the plaintiff; that the only proper judgment which could have been taken against the plaintiff was a judgment of dismissal, and could not after that lawfully proceed to trial, etc. This motion was overruled, and the only question in the case is, as to the right of the court to proceed to hear and determine the case in the absence of the plaintiff.

The 16th section of the 9th article of our Code of Civil Practice provides that, "When the action is called for trial, either party may proceed to try the issues, and in the absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case and take a dismissal of the suit, or a verdict, or judgment, as the case may require."

Previous to the introduction of the code, the chancery practice act provided that "No complainant shall be allowed to dismiss his bill, after cross-bill filed, without the consent of the defendant." Sec. 14, Art. 2, Rev. Co. of 1835. In the same article, in the revision of 1845, this provision is copied as sec. 23, p. 842.

By the 3d section of the act concerning divorce, the defendant is allowed to make his answer a cross-bill, and the statute requires such answer to be sworn to in the same manner as the original petition, and then the section proceeds to declare "that upon the hearing of the cause, if the court shall be satisfied that the defendant is the injured party, it shall enter judgment divorcing the defendant from the said plaintiff, as prayed for in the answer."

Did this section mean that a cause could not be heard in the absence of the plaintiff? The 16th section of the practice act seems to assume the contrary. The 8th section of the divorce law also provides that, "in all cases where the proceedings shall be *ex parte*, the court shall, before it grants the divorce, require proof of the good conduct of the petitioner, and be satisfied that he or she is an innocent and injured party."

Both parties are petitioners in this case. The proceeding may be *ex parte*, either by the absence of one or the other.

The case of Nordmanser v. Hitchcock, 40 Mo. 182, has not escaped our examination; but it is obvious that the 16th section of our practice act was not considered in that case, and it did not involve any construction of our divorce law.

The judgment of the general term is reversed, and that of the circuit court in special term affirmed. The other judges concur.

JUDGE VORIES ABSENT.

—THE Kentucky interest law has been changed so as to limit the amount which may be taken by special agreement to 8 per cent.

Subscription by County for Railroad Stock.

THE TOWN OF CONCORD v. PORTSMOUTH SAVINGS BANK.

Supreme Court of the United States, October Term, 1875.

Subscription by County for Railroad Stock.—Where, in 1869, a county board of supervisors were, by legislative act, authorized to subscribe to the capital stock of a railroad company, to a certain amount, and issue bonds of the county therefor, *provided* the bonds should not be issued, till the railroad should be opened for traffic; and afterwards, in the same year, the board met and informally resolved to subscribe a certain sum to the capital stock of the company, and issue county bonds therefor, and the substance of these resolutions was referred to an attorney to write in form for record, from minutes furnished by the chairman of the board, and the resolutions were afterward entered by the clerk upon the records as of the date of the said meeting, without any further order of the board to enter the resolution of record; and afterwards, but before the issue of the bonds, the new state constitution was adopted, prohibiting such powers: *Held*, that the authorized body of a municipal corporation may bind it by resolution which shall operate as a contract in favor of private parties. The resolution to subscribe was the act of the corporation—its immediate subscription to the stock of the company. No other act of the board was needed, and, being accepted by the railroad company, it became an authorized contract between the county and the railroad company, before the new constitution came into operation. And whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the new constitution. The delivery of the bonds was only the performance of the contract.

In error to the Circuit Court of the United States for the Southern District of Illinois.

Mr. Justice STRONG delivered the opinion of the court.

This case differs very materially from the case of The Town of Concord v. The Portsmouth Savings Bank, No. 43, of this term. In that, we held that the bonds were void because the legislative authority to issue them as a donation to the railroad company had been annulled by the constitutition of the state before the donation was made. In the present case the authority exercised was given to the county by the act of March 26, 1869, incorporating the railroad company. The tenth section of the act was as follows: "The board of supervisors of Moultrie County, are hereby authorized to subscribe to the capital stock of said company, to an amount not exceeding eighty thonsand dollars, and to issue the bonds of the county therefor, bearing interest at a rate not exceeding ten per cent. per annum, said bonds to be issued in such denominations, and to mature at such times as the board of supervisors may determine, provided that the same shall not be issued until the said road shall be open for traffic between the city of Decatur and the town of Sullivan aforesaid." No approving popular vote was required.

It is not to be doubted that this section gave to the county complete authority to make a subscription to the capital stock of the company. The power was fettered by no conditions or limitations, except as to the amount which might be subscribed, but the payment of the subscription was directed to be postponed until the railroad should be opened. And, of course, as a greater power includes every constituent part of it, the legislative act empowered the board of supervisors to agree to subscribe preparatory to an actual subscription. The power thus granted was never revoked, unless it was by the new constitution of the state, which did not take effect prior to July 2, 1870. Whatever was done in pursuance of the power before that time, if anything was, could not be affected by the constitution subsequently adopted. Subscriptions, or contracts to subscribe, made in pursuance of it before it was abrogated, remained binding, for a constitution can no more impair the obligation of a contract than ordinary legislation can. It must be conceded that had no subscription been made, or engagement to subscribe entered into, before the new constitution took effect, none could have been after. But the special finding of facts shows that one was made in 1869. On the 16th of December of that year, the board of supervisors met and informally resolved to subscribe $80,000.00 to the capital stock of the railroad company, and the resolutions were referred to a lawyer to be put in form before being recorded on the records of the board. They were accordingly prepared from minutes furnished by the chairman of the board, and entered by the clerk upon the record, as of the date of the December meeting of the board, and duly attested. This must have been done prior to the first Tuesday in March, 1870. The record, as it appears under date of December 14, 1869, is as follows;

"And it is further ordered by the board of supervisors of Moultrie County that, under and by virtue of the authority conferred upon said board by an act approved March 26th, A. D. 1869, entitled 'An act to incorporate the Decatur, Sullivan and Mattoon Railroad Company,' the County of Moultrie subscribed to the capital stock of the Decatur, Sullivan and Mattoon Railroad Company the sum of eighty thousand dollars to aid in the construction of a railroad by said company, in pursuance of their charter.

"And be it further ordered by the board of supervisors aforesaid that, when said railroad shall be 'open for traffic' between the city of Decatur and the town of Sullivan aforesaid, there be issued eighty thousand dollars of the bonds of said county, in denominations of not less than five hundred dollars, payable to said company, drawing interest, to be paid annually, at the rate of eight per cent. per annum; the principal to be due and payable ten years after date, or sooner, at the option of the county; and that said bonds be delivered to said railroad company in full payment of the subscription of said county so made as aforesaid."

It is true there was no further order of this board to enter the resolutions of record, but it was the clerk's duty to make the entry. The substance of them had been adopted. They required no further action, ex-

cept to put them in form. No further action appears to have been contemplated. They remain of record still, and the board has never taken any action to correct the record. On the contrary, it has been recognized by subsequent action. At the December meeting of 1872, a special committee was appointed to examine the records of subscriptions of railroad donations, and report. The committee did report on the 25th day of December, 1872, that the subscription of $80,000.00 under the act of the general assembly of March 26, 1869, to aid in the construction of the Decatur, Sullivan and Mattoon Railroad, was in accordance with law. Under this action of the board, and the report of the committee, the bonds were delivered. It is impossible, therefore, to doubt that the resolutions adopted in December, 1869, as recorded, must be treated as the action of the board at that time. And, if so, they amounted to a subscription to the stock of the company, and created an obligation for the payment of the subscription in county bonds. It is true no subscription was made *on the books* of the railroad company until July, 1871, when one was made by Mr. Titus, chairman of the board, without any express authority, and then made for the purpose of enabling him to vote at an election. But a subscription on the books of the company was unnecessary, for that which amounted to a subscription had been made in December, 1869. The authorized body of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract, or they may bind it by a resolution, or by vote clothe its officers with power to act for it. The former was the clear intention in this case. The board clothed no officer with power to act for it. The resolution to subscribe was its own act; its immediate subscription. Western Saving Fund Society v. The City of Philadelphia, 31 Penn. St. 174; Sacramento v. Kirk, 7 Cal. 419; Logansport v. Blakemore, 17 Ind. 318. In the Justices of Clarke County Court v. The Paris, Winchester and Kentucky River Turnpike Co., 11 Ben. Monroe, 143, it was ruled that an order of the county court, by which it was said the court subscribed, on behalf of Clarke county, for fifty shares of stock in the turnpike company, if concurred in by a competent majority of the magistrates, was itself a subscription, and bound the county. There was no subscription on the books of the company, but the court of appeals said "we can not, therefore, regard this order as a mere offer or pledge to subscribe the fifty shares in this particular road, but as actually taking, and in substance and legal effect subscribing for that number of shares So in Nugent v. The Supervisors of Putnam County, 19 Wall. 241, it was said that to constitute a subscription by a county to stock in a railroad company, it is not necessary that there be an act of manual subscribing on the books of the company. These cases lead directly to the conclusion that the action of the board of supervisors in December, 1869, was in substance and in legal effect a subscription.

And if this conclusion could not be reached, it would make but little difference to the present case, for it could not be doubted that the action of the board was at least an undertaking to subscribe, and this was assented to or accepted by the railroad company. The resolutions were entered of record by the clerk and president of the railroad company, and the company made an appropriation of the bonds to be received in payment for the subscription, by a contract made on the 15th of April, 1870. In either aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new constitution came into operation. No matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the constitution. The delivery of the bonds was no more than performance of the contract. For these reasons it is in vain to appeal to the decisions made in Aspinwall v. The County of Davies, 22 Howard, 364, and The Town of Concord v. The Savings Bank, decided at this term. In neither of those cases was there any contract made before the authority to make one was annulled. We do not assert that the constitutional provision did not abrogate the authority of the board of supervisors to make a subscription for railroad stock. On the contrary, we think it did. But we hold that contracts made under the power while it was in existence were valid contracts, and that the obligations assumed by them continued after the power to enter into such contracts was withdrawn. The operation of the constitution was only prospective. Indeed, it is expressly ordained in its schedule that "all rights, actions, prosecutions, claims, and contracts of the state, individuals, or bodies corporate shall continue to be as valid as if this constitution had not been adopted." It is hardly necessary to say that under the act of the general assembly, the authority to make a subscription was coupled with an authority and a duty to issue county bonds for the sum subscribed. No action of the board was needed after the subscription was made.

This disposes of the only material question in the case. There is, however, another consideration that is worthy of notice. The findings of the court are that the plaintiff below is a purchaser of the bonds for a valuable consideration, having purchased them before their maturity and without notice of any defence. They were executed by the president of the board of supervisors and the county clerk. They recite that they are issued by the county of Moultrie, "in pursuance of the subscription of the sum of eighty thousand dollars to the capital stock of the Decatur, Sullivan and Mattoon Railroad Company, made by the board of Supervisors of said county of Moultrie, in December, A. D. 1869, in conformity to the provisions of an act of the general assembly of the state of Illinois, approved March 26, A. D. 1869."

Now, if it be supposed that the purchaser of bonds with such recitals was bound to look further and enquire what was the authority for the issue, where was he to look? Had he looked to the act of the general assembly of March 26, 1869, he would have found plenary authority for a stock subscription and for the issue of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2, 1870, he knew that any subscription made before that time continued binding notwithstanding the constitution, and that bonds issued in payment of it were, therefore, lawful. If, then, he had enquired whether a subscription had been made before July 2, 1870, at the only place where enquiry should have been made, namely, at the records of the board, he would have found an order to subscribe, equivalent to a subscription made, in December, 1869, corresponding with the assertions of the recitals, and declared by them to have been a subscription. He could have made enquiry nowhere else with any prospect of learning the truth. Every step he could have taken assured him that the recitals were true. How, then, can the county be permitted to set up against a *bona fide* holder of the bonds, that the authority to make a subscription with all its legitimate consequences had expired before the subscription was made, in the face of the recitals and of the county records? Whether it had expired was a matter of fact, not of law, and it was peculiarly, if not exclusively, within the knowledge of the board of supervisors. After having assured a purchaser that their subscription was made in December 1869, when they had power to make it, it would be tolerating a frand to permit the county to set up, when called upon for payment, that it was not made until after July 2, 1870, when their authority expired.

It is unnecessary to say more. Some matters which we have not noticed were assigned as errors, but they were not mentioned in the argument; and, in our opinion, they exhibit no error in the court below.

The judgment is affirmed.

Federal Right of Eminent Domain—Power of the General Government to Appropriate Land for its own Use by Condemnation.

KOHL, *ET AL.* v. THE UNITED STATES.

Supreme Court of the United States, October Term, 1875.

Where an act of Congress authorized the secretary of the treasury to purchase a suitable site for the erection of a building for accommodation of the United States courts, custom house, post office, etc., *provided* no money be so expended until the state cede its jurisdiction over the site and relinquish its right to tax the property; and, by amendment, Congress appropriated money "for the purchase of such site at private sale, or by condemnation," but prescribed no mode of enforcing the power; and the land was condemned by proceedings in the United States Circuit Court: *Held*, (1) that the proceeding in the United States Circuit Court was a proceeding by the United States government in its own right and by virtue of its own eminent domain. (2) The power to obtain land by condemnation, without prescribing the mode of exercising the power, gave also the power to obtain the land by any appropriate means.

Argument 1. The power to establish post offices and to create courts within the states, conferred upon the federal government, included authority to obtain sites for such offices, and for court houses, and to obtain them by known and appropriate means. The right of eminent domain was one of these means, well known when the constitution was adopted, and employed to obtain lands for public use, and though this power has not heretofore been exercised adversely, yet the non-use of the power does not disprove its existence.

Argument 2. The right of eminent domain is a right belonging to a sovereignty, to take private property for its own public uses, and not for those of another; and necessity alone is the foundation of the right. The power is complete in the United States. No state can enlarge or diminish it, nor prescribe the manner of its exercise. The consent of a state can never be a condition precedent to its enjoyment.

Argument 3. The eleventh section of the judiciary act of 1789, giving jurisdiction to the circuit courts of suits of a civil nature, at common law or in equity, was intended to embrace, not merely suits recognized by the common law among its old and settled proceedings, but suits in which legal rights were to be ascertained, as distinguished from rights in equity. The right of eminent domain was always a right at common law—was never the creature of a statute. The right itself is superior to any statute.

In error to the Circuit Court of the United States for the Southern District of Ohio.

Mr. Justice STRONG delivered the opinion of the court.

It has not been seriously contended, during the argument, that the United States government is without power to appropriate lands or other property within the states for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These can not be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the constitution in the general government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories, and arsenals, for navy-yards and light houses, for custom houses, post offices, and court houses, and for other public uses. If the right to acquire property for such uses may be made a barren right, by the unwillingness of property holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen. This can not be. No one doubts the existence in the state governments of the right of eminent domain; a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring

of political necessity, and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, ch 20, 34; Bynkershoek, lib. 2. c. 15; Kent's Coms. 338–40; Cooley on Const. Lim. 584, *et seq.* But it is no more necessary for the exercise of the powers of a state government, than it is for the exercise of the conceded powers of the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are committed to it, but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But if the right of eminent domain exists in the federal government, it is a right which may be exercised within the states, so far as in necessary to the enjoyment of the powers conferred upon it by the constitution. In Ableman v. Booth, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post offices and to create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for court houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power ought not to be questioned. The constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion that on making just compensation it may be taken? In Cooley on Constitutional Limitations, p. 526, it is said: "So far as the general government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions, as must sometimes be necessary in the case of forts, light houses and millitary posts or roads, and other conveniences and necessities of government, the general government may exercise the authority as well within the states as within the territory under its exclusive jurisdiction, and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties or of any other authority." We refer, also, to Trombley v. Humphrey, 23 Michigan, 471; 10 Peters, 723; Dickey v. Turnpike Comp. 7 Dana, 113; McCullough v. Maryland, 4 Wheaton, 429.

It is true, this power of the federal government has not heretofore been exercised adversely, but the non-user of a power does not disprove its existence. In some instances the states, by virtue of their own right of eminent domain, have condemned lands for the use of the general government and such condemnations have been sustained by their courts without, however, denying the right of the United States to act independently of the states. Such was the ruling in Gilmer v. Lime Point, 18 Cal. 229, where lands were condemned by a proceeding in a state court and under a state law for a United States fortification. A similar decision was made in Burt v. The Merchants' Insurance Company, 106 Mass. 356, where land was taken under a state law as a site for a post office and sub-treasury building. Neither of these cases denies the right of the federal government to have lands in the states condemned for its uses under its own power and by its own action. The question was whether the state could take lands for any other public use than that of the state. In Trombley v. Humphrey, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be that it is a right belonging to a sovereignty to take private property for its own public use and not for those of another. Beyond that, there exists no necessity, which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

It may, therefore, fairly be concluded that the proceeding in the case we have in hand was a proceeding by the United States government in its own right and by virtue of its own eminent domain. The act of Congress of March 2, 1872, 17 Stats. at Large, 39, gave authority to the secretary of the treasury to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom house, United States depository, post office, internal revenue and pension offices, at a cost not exceeding three hundred thousand dollars, and a proviso to the act declared that no money should be expended in the purchase until the state of Ohio should cede its jurisdiction over the site and relinquish to the United States the right to tax the property. The authority here given was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. It is true, the words "to purchase" might be construed as including the power to acquire by condemnation, for technically, purchase includes all modes of acquisition other than that of descent. But generally in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference. That Congress intended more than this is evident, however, in view of the subsequent and amendatory act passed June 10, 1872, which made an appropriation "for the purchase at private sale or by condemnation of the ground for a site" for the building. These provisions, connected as they are, manifest a clear intention to confer upon the secretary of the treasury power to acquire the grounds needed, by the exercise of the power of eminent domain, or by private purchase, at his discretion. Why speak of condemnation at all if Congress had not in view an exercise of the right of eminent domain and did not intend to confer upon the secretary the right to invoke it?

But it is contended on behalf of the plaintiffs in error that the circuit court had no jurisdiction of the proceeding. There is nothing in the acts of 1872, it is true, that directs the process by which the contemplated condemnation should be effected, or which expressly authorizes a proceeding in the circuit court to secure it. Doubtless Congress might have provided a mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal, or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the circuit court; but this we think was not necessary. The investment of the secretary of the treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The judiciary act of 1789 conferred upon the circuit courts of the United States jurisdiction of all suits at common law, or in equity, when the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs. If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the circuit court. That it is a "suit" admits of no question. In Weston v. Charleston, 2 Pet. 464, Chief Justice Marshall, speaking for this court, said, "the term (suit) is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy which the law affords. The modes of proceeding may be various, but if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought, is a suit." A writ of prohibition has, therefore, been held to be a suit; so has a writ of right, of which the circuit court has jurisdiction (Green v. Liter, 8 Cranch, 229); so has *habeas corpus*. Holmes v. Jamison, 14 Pet. 564. When in the eleventh section of the judiciary act of 1789, jurisdiction was given to the circuit courts, of suits of a civil nature at common law, or in equity, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, as distinguished from rights in equity, as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial, for many civil, as well as criminal, proceedings at common law were without a jury. It is difficult then to see why a proceeding to take land, in virtue of the government's eminent domain, and determining the compensation to be made for it is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature, at least, quasi judicial. Certainly no other mode than a judicial trial has been provided.

It is argued that the assessment of property for the purpose of taking it, is in its nature like the assessment of its value for the purpose of taxation. It is said they are both valuations of the property to be made as the legislature may prescribe, to enable the government, in the one case, to take the whole of it, and in the other to take a part of it for public uses, and it is argued that no one but Congress could prescribe in either case that the valuation should be made in a judicial tribunal, or in a judicial proceeding, although it is admitted the legislature might authorize the valuation to be thus made in either case. If the supposed analogy be admitted, it proves nothing. Assessments for taxation are specially provided for, and a mode is prescribed. No other is, therefore, admissible. But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law, and, hence, as the government is a suitor for the property, under a claim of legal right to take it, there appears to be no reason for holding that the proper circuit court has not jurisdiction of the suit, under the general grant of jurisdiction made by the act of 1789.

The second assignment of error is that the circuit court refused the demand of the defendants below, now plaintiffs in error, for a separate trial of the value of their estate in the property. They were lessees of one of the parcels sought to be taken, and they demanded a separate trial of the value of their interest, but the court overruled their demand and required that the jury should appraise the value of the lot or parcel, and that the lessees should in the same trial try the value of their leasehold estate therein. In directing the course of the trial the court required the lessor and the lessees each separately to state the nature of their estates to the jury, the lessor to offer his testimony separately, and the lessees theirs, and then the government to answer the testimony of the lessor and the lessees, and the court instructed the jury to find and return separately the value of the estates of the lessor and the lessees. It is of this the les-

sees complain. They contend that whether the proceeding is to be treated as founded on the national right of eminent domain, or on that of the state, (its consent having been given by the enactment of the state legislature of Feb. 15, 1873, 70 Oh. Laws, 36 sec. 1), it was required to conform to the practice and proceedings in the courts of the state in like cases. This requirement it is said, was made by the act of Congress of June 1, 1872. 17 Stats. at L. 522. But admitting that the court was bound to conform to the practice and proceedings in the state courts in like cases, we do not perceive that any error was committed. Under the laws of Ohio it was regular to institute a joint proceeding against all the owners of lots proposed to be taken; (Giesy v. C. W. & T. R. R. Co., 4 Ohio St. 308), but the 8th section of the state statute gave to "the owner or owners of each separate parcel" the right to a separate trial. In such a case, therefore, a separate trial is the mode of proceeding in the state courts. The statute treats all the owners of a parcel as one party, and gives to them collectively a trial separate from the trial of the issues between the government and the owners of other parcels. It hath this extent, no more. The court is not required to allow a separate trial to each owner of an estate or interest in each parcel, and no consideration of justice to those owners would be subserved by it. The circuit court, therefore, gave to the plaintiffs in error all, if not more than all, they had a right to ask.

The judgment of the circuit court is affirmed.

Registration Bond Act—Fraudulent Antedating—Innocent Holder.

ANTHONY v. JASPER COUNTY.

United States Circuit Court, Western District of Missouri.

Before Hon. JOHN F. DILLON, Circuit Judge, and Hon. ARNOLD KREKEL, District Judge.

A statute of Missouri (Laws of 1872, p. 56) provided that "*before* any bond hereafter issued by any county shall obtain validity or be negotiated," it must be first registered by the state auditor, who shall certify thereon that all conditions precedent required by law, and by the contract under which the bonds were ordered to be issued, have been complied with. Two days after the passage of this statute, certain bonds were issued by the County Court of Jasper County to a railway company, the said company not having fully complied with the conditions upon which the issue of the bonds had been authorized by a vote of the people. In order to evade the statute, the bonds were antedated to a date prior to the passage of the act. *Held*, that they were void, even in the hands of an innocent holder, and that the county was not estopped to set up this defence.

Argument. Where a statute declares absolutely and without exception that a contract or bond or note is void, it is void into whosoever hands it comes.

The court made the following special findings of facts, viz:

1. This action is brought for the collection of interest coupons originally attached to bonds of the following tenor:

COPY OF BOND AND COUPON.

"United States of America,
State of Missouri,

No. 1. Jasper County Bond. $500.

Interest ten per cent. per annum.

Know all men by these presents: That the county of Jasper and state of Missouri acknowledge itself indebted and firmly bound to the Memphis, Carthage & Northwestern Railroad Company or bearer, in the sum of five hundred dollars, which sum said county of Jasper for and on account of Marion township, for value received, hereby promises to pay said company or bearer, at the National Park Bank, in the city of New York and state of New York, twenty years after date, with interest thereon, from the date hereof, at the rate of ten per cent; per annum, payable semi-annually on the first days of January and July of each year, on the presentation and delivery at said National Park Bank, in said city of New York, state of New York, of the coupons of interest hereto attached. This bond is issued pursuant to an order of the County Court of said County of Jasper, made by authority of an act of the general assembly of the state of Missouri, entitled "An Act to facilitate the construction of railroads in the state of Missouri," and approved on the 23rd of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township. In testimony whereof the the said county of Jasper has executed this bond by the presiding justice of the county court of said county, under the order of said court signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing thereto the seal of said court. This done at the office of the clerk of said court this 28th day of March, A. D. 1872.

{SEAL.}

R. S. MERWIN,
Presiding Justice of the County Court
of Jasper County, Mo.
A. E. GREGORY.
Clerk of the County Court of Jasper County, Missouri:

CARTHAGE, JASPER COUNTY,———1872.

The county of Jasper promises to pay the sum of twenty-five dollars on the first day of July, 1873, being interest on bond No. 1, for $500, payable at the National Park Bank in the City and State of New York.

A. E. GREGORY,
Clerk of the County Court of Jasper County, Missouri."

2. That at the regular term of the County Court of Jasper County, Missouri, held on the 10th day of Feburary, 1872, the following, among other proceedings, was had, to wit:

"WHEREAS, More than twenty-five persons, tax-payers and residents of the municipal township of Marion, in the County of Jasper, in the State of Missouri, have petitioned this court, setting forth their desire as a township to subscribe to the capital stock of the Memphis, Carthage and Northwestern Railroad Company, proposing to build a railroad into and through said township; that the amount they desire to subscribe is seventy-five thousand dollars, upon the following named terms and conditions, viz:

"First. That the railroad of said company be continued and extended through said township of Marion, from the depot at Carthage, westward to some point on the Missouri River, Fort Scott and Gulf Railroad, in the State of Kansas, within nine months from the 1st day of March, one thousand eight hundred and seventy-two, and that the work of grading and constructing be commenced within twenty days after the date of making the subscription and be pushed vigorously until completed.

"Second. That the machine and repairing shops of the said company be permanently located and forever maintained within three-quarters of of a mile of the public square in Carthage, and said shops, with their equipments, when completed, shall cost not less than three hundred thousand dollars; that the construction of said shops shall begin within sixty days after the cars are running to the depot at Carthage, and be completed within one year.

"Third. That such subscription shall be paid by issuing and delivering of the bonds of said township to the said railroad company, said bonds to be of the denomination of five hundred dollars each, to bear date on the day and year when said railroad company shall become entitled to receive the same under the stipulations herein contained. Aforesaid bonds to bear ten per centum interest per annum from the date they are delivered, the interest payable semi-annually, and represented by the coupons to be attached, the principal payable twenty years after date, and both the principal and interest payable at the National Park Bank, in the City of New York, in the State of New York. 'Said railroad shall be equal to the standard construction of railroads in the State of Missouri, and of the same gauge as the Atlantic and Pacific Railroad.' The aforesaid bonds shall be issued and be placed in escrow and bear interest as aforesaid from the date of the delivery of said bonds to the aforesaid Railroad Company.

"Fourth. That when the cars are running regularly on said railroad for the transportation of freight and passengers from the town of Pierce City, in Lawrence County, Missouri, into and through Marion township to the depot at Carthage, and thence westward to a point on the Missouri River, Fort Scott & Gulf Railroad within the time specified in the first specification herein, to-wit; nine months from the first day of March, one thousand eight hundred and seventy two, and making regular connection with the Atlantic and Pacific Railroad at Pierce City in the County of Lawrence in the State of Missouri, and the Missouri River, Fort Scott & Gulf Railroad in the State of Kansas, fifty thousand dollars, of said subscription, and when at least fifty thousand dollars shall have been first expended and paid out towards the construction of said machine and repair shops, and work begun in good faith for their erection, then twenty-five thousand dollars more of said bonds shall be delivered by said company."

3. That at a special term of the County Court of Jasper County, Missouri, held on the 28th day of March, 1872, the following among other proceeding was had, to wit. "In the matter of a subscription to the capital stock of the Memphis, Carthage and Northwestern Railroad Company in behalf of Marion township.

"WHEREAS, it appearing from the returns of an election held in pursuance of an order of this court on Tuesday, the 5th day of March, A. D., 1872, that more than two-thirds of the qualified voters of the municipal township of Marion in Jasper county, Missouri, voting at said election, are in favor of subscribing to the capital stock of the Memphis, Carthage and Northwestern Railroad Company, seventy-five thousand dollars upon the terms and condition as set forth in the petition heretofore presented, and the order of this court made on the 10th day of Feburary, A. D. 1872 for said election, and that more than two-thirds of the voters of said township voted in favor of such subscription being made; now therefore it is ordered by the court that the sum of seventy-five thousand dollars be and is hereby subscribed to the capital stock of said railroad company in behalf of said Marion township, according to the terms and conditions of said order of election, and that the bonds to be issued in payment of such subscribtion be signed by the presiding justice of this court, and attested by the clerk of this court with the seal of this court affixed."

4. That at an adjourned term of the County Court of Jasper County, Missouri, held on the 4th day of June, A. D., 1872, the following among other proceedings was had, to wit. "Ordered by the court that fifty thousand dollars of Marion township bonds voted to the Memphis, Carthage and Northwestern Railroad Company be issued, and that the clerk of this court have the same registered according to law, and that when so registered, the same shall be deposited in escrow in some responsible banking house in the City of St. Louis.

5. That by an act of the general assembly of the state of Missouri, entitled "an act to provide for the registration of bonds, issued by counties, cities and incorporated towns, and to limit the issue thereof," approved March 30, 1872, enacted *inter alia:*

Section 4. Before any bond hereafter issued by any county, city or incorporated town, for any purpose whatever, shall obtain validity, or be negotiated, the same shall be presented to the state auditor, who shall register the same in a book or books provided for that purpose in the same manner as the state bonds are now registered, and who shall certify by

endorsement on such bond that all the conditions of the laws have been completed within its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with; and the evidence of that fact shall be filed and preserved by the auditor. But such certificate shall be *prima facie* evidence only of the facts therein stated and shall not preclude or prohibit any person from showing or proving the contrary, in any suit or proceeding to test or determine the validity of such bonds or the power of any county court, city or town council or board of trustees, or other authority, to issue such bonds; and the remedy by injunction shall also be at the instance of any tax-payer of the respective county, city or incorporated town, to prevent the registration of any bonds alleged to be illegally issued or founded on any provisions of this act."

6. That John Purcell was the presiding justice of the County Court of Jasper County on the 28th day of March, 1872, and continued to hold said office until the —— day of September, 1872, when he resigned; and that R. S. Merwin was a member of the said county court in March, 1872, and until the 21st day of October, 1872, when he became and thereafter was presiding justice of said court; and these facts appear by the records of said court.

7. That the bonds in controversy were sealed with the seal of the County Court of Jasper County, affixed by the clerk and signed by the clerk, and at the same time said bonds were signed by the said R. S. Merwin, which was after he became presiding justice of said county court in October, 1872. Merwin delivered the said bonds in October, 1872, to the Union Savings Association of St. Louis, for the use of one Edward Burgess, a contractor for the building of the railroad named in the bonds, having first removed the first two coupons, and the said bonds were purchased by one William C. Wilson from said Burgess at the rate of fifty-five cents on the dollar, which was then the market value of said bonds, and the same were paid for in November, 1872, by the said Wilson, giving his check to Burgess for the amount ($27,500) on the said Savings Association, which check was paid. Neither the other justice of the county court nor the county court consented to the said delivery of the said bonds by Merwin to or for the use of Burgess. The said railroad for which the bonds issued was finished through Marion township, but the said railroad company has never complied with the condition of the vote requiring its railroad to be continued and extended through said township of Marion, from the depot at Carthage westward to some point on the Missouri River, Fort Scott & Gulf Railroad, in the State of Kansas, and there still remains about nine miles of such railroad to be constructed in Kansas.

8. That said bonds when signed, sealed and delivered as aforesaid, were antedated so as to bear date the 28th day of March, 1872, and they were never presented to the state auditor, and he never registered the same nor made any certificate thereon under the provisions of said statute approved March 30, 1872, and said bonds, as held by the plaintiff, contain no certificate of registration endorsed or written thereon.

9. That the plaintiff is a *bona fide* purchaser of said bonds and coupons for value, without actual notice of any matter of fact impairing the regularity and validity of said bonds, and without actual notice that the said bonds had been antedated so as to bear date prior to the 30th day of March, 1872.

Joseph Shippen, for plaintiff; *E. J. Montague*, for county.

DILLON, Circuit Judge; KREKEL, J. concurring.

The well known history of the issue of municipal bonds in this state, as it appears by the many cases in this court, shows that conditions imposed by law requiring a popular vote or conditions in the propositions submitted to the voters, intended to prevent fraud and to secure the actual building and completion of the roads, have been often evaded, and the bonds issued without compliance therewith. Such bonds, when negotiated for value, the courts have held to be binding. To prevent such improper or improvident issue of bonds in the future, the legislature passed the act of March 30, 1872. Laws 1872, p. 56.

The fourth section of that act provides that "*before* any bond, hereafter issued by any county * * shall *obtain validity or be negotiated*," it must be *first* registered by the state auditor, who shall certify thereon that all conditions precedent required by law, and by the contract under which the bonds were ordered to be issued, have been complied with.

In this case the bonds were signed, sealed and issued in the manner above appearing, *after* this statute went into effect, and were antedated to a date prior to the passage of that enactment. In point of fact, the conditions on which the bonds had been voted had not been fully complied with; and hence they could not have been, and were not certified by the auditor, as registered bonds. The bonds have found their way into the hands of an innocent holder for value, who did not know that the bonds bore a false date.

If the bonds bore date after the act of March 30, 1872, and had not been registered, it is plain, we think, that they would have no "*validity*," and hence could not support an action in the hands of any person. But they are antedated, and the question is, whether they have validity in the hands of the innocent purchaser. Upon the best consideration we have been able to give, our conclusion is that the bonds can not be enforced. The case comes within the doctrine, which is well settled, that where a *statute* declares absolutely and without exception that a contract or bond or note is void, it is void into whosesoever hands it may come. This statute declares that no unregistered bond shall be valid or be negotiated. Bonds must *first* be registered. Without registration they "*obtain no validity*." Such is a statute. A declaration that bonds shall have no validity is equivalent to declaring them to be void.

Is the county estopped to set up this defence? We think not. The case is to be distinguished from those decided by the Supreme Court of the United States, in which it is held that the frauds of the officers can not be visited upon the innocent bondholder, and falls within the case of Bayley v. Taber, 5 Mass. 286. In that case it was held, where a statute enacted that promissory notes, of a certain discription, "made or issued" after a specified day, should be "utterly void, and no action should be sustained thereon," that it was competent to the makers of such notes, when sued upon notes bearing date *before* the day fixed by the statute, to prove that they were, in fact, made and issued *after* such day.

The principal of that case is the same as in the case at the bar, and if that is a sound principle when applied to the individual maker of prohibited paper, it should apply with at least equal force in favor of public bodies, where one or two officers, without the consent of the others, may, as in this case, combine to evade the law—the other officers being innocent of wrongful participation.

The principle involved is one of great consequence. For illustration: Loose and general powers have been heretofore given in this state to municipalities and counties to issue such bonds. This power has been taken away by the new constitution. Can the protective provisions of that instrument be evaded and rendered useless by the mere fraudulent act of the officers of the county in antedating the bonds? If so, the power to defraud is endowed with a fearful vitality, which survives the prohibitions of the constitution, and threatens to become immortal.

Railway Aid-Bonds—What is Conclusive Evidence of their Regularity.

THE TOWN OF VENICE v. MURDOCK.

Supreme Court of the United States, October Term, 1875.

Where by law an incorporated town was allowed to borrow, on its bonds to be issued therefor, money to be paid to such railroad company as should construct a railroad through the town connecting certain termini of other railroads *provided* said loan and issue of bonds should be assented to by two-thirds of all the resident tax-payers of the town, whose written assent should be certified by the affidavit of the supervisor and railroad commissioners of the town, stating the fact that the said signers constituted two-thirds of the resident tax-payers of the town, said certificate to be filed in the county clerk's office; and in pursuance of said act and in compliance therewith, bonds of the town were so issued, reciting said act,—*Held*, in an action brought against the town by a *bona fide* holder of such bonds, that the sworn statement of the supervisor and commissioner, filed in the county clerk's office, was a decision, and the recital in the bonds was a declaration of the decision, and concluded the town against denying that the condition precedent to the issue of the bonds had been performed.

In error to the Circuit Court of the United States for the Northern District of New York.

Mr. Justice STRONG delivered the opinion of the court.

It would be worse than useless for us to discuss separately each of the twenty-two assignments of error filed in this case, for the questions involved that are of any importance are very few in number. The leading one is whether sufficient authority was shown at the trial for the issue of the town bonds. The act of the legislature empowered the supervisor and the railroad commissioners of the town to borrow money and to execute bonds therefor to an amount not exceeding $25,000. It directed that all moneys borrowed under its authority should be paid over to the president and directors of such railroad company (then organized, or that might thereafter be organized, under the provisions of the general railroad law) as might be expressed by the written assent of two-thirds of the resident tax-payers of the town, to be expended by said president and directors in grading, constructing and maintaining a railroad or railroads passing through the city of Auburn and connecting Lake Ontario with the Susquehanna and Cayuga railroad, or the New York and Erie railroad.

The act provided, however, that said supervisor and commissioners should have no power to do any of the acts authorized by the statute until a railroad company had been duly organized according to the requirements of the general railroad law, for the purpose of constructing a railroad between the termini above mentioned, and through the town, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money might be borrowed, should have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga county, together with the affidavit of such supervisor or commissioners, or any two of them attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

This act was passed on the 16th day of April, 1852, and on the 23d of August next following a railroad company was organized to construct a railroad thorugh the town between the termini mentioned in the act. On the 3d of November, 1852, there was filed in the office of the county clerk of Cayuga county a written assent that the supervisor and assessors of the town (the assessors being railroad commissioners) might borrow such sum of money as they might deem necessary, not exceeding $25,000, giving town bonds therefor, and that the money might be paid to the railroad company organized to construct the railroad. Two hundred and fifty-nine names were signed to the assent, the persons signing representing themselves to be resident tax-payers of the town of Venice. Upon this instrument was endorsed the affidavit of the supervisor and one of the commissioners that the persons whose names were subscribed to the assent comprised two-thirds of all the resident tax-payers of the

said town of Venice on its assessment-roll next previous to the date of the affidavits, namely, next previous to October 30, 1852, and on the 2d of March next following the supervisor and the commissioners executed the bonds now in suit. Evidence of these facts was given at the trial, but the defendant objected to the admission in evidence of this assent, and of the bonds, on the ground that the plaintiff must first prove that the signatures to the assents were the genuine signatures of those persons whose names purported to be signed. The circuit court overruled this objection, and whether rightfully or not is the primary and almost the only material question in the case.

It is very obvious that if the act of the legislature which authorized an issue of bonds in aid of the construction of the railroad on the written assent of two-thirds of the resident tax-payers of the town, intended that the holder of the bonds should be under obligation to prove by parol evidence that each case of the two hundred and fifty-nine names signed to the written assent was a genuine signature of the person who bore the name, the proffered aid to the railroad company was a delusion. No sane person would have bought a bond with such an obligation resting upon him whenever he called for payment of principal or interest. If such was the duty of the holder it was always his duty. It could not be performed once for all. The bonds retained in the hands of the company would have been no help in the construction of the road. It was only because they could be sold that they were valuable. Only thus could they be applied to the construction. Yet it is not to be doubted the legislature had in view and intended to give substantial aid to the railroad company if a sufficient number of the tax-payers assented. They must have contemplated that the bonds would be offered for sale, and it is not to be believed they intended to impose such a clog upon their salableness as would rest upon it if every person proposing to purchase was required to enquire of each one whose name appeared to the assent whether he had in fact signed it.

The act of the legislature manifests a contrary intent. It created a tribunal to determine whether two-thirds of the resident tax-payers had assented. That tribunal was the supervisor and the commissioners, empowered also to execute the bonds in case such an assent was given. They were the appointed agents to obtain the assent, and, when acquired, they, or any two of them, were to make an affidavit that the persons whose written assents were attached to the statement comprised two-thirds of the resident tax-payers. That statement, with the affidavits, was required to be filed in the county clerk's office. All this indicates unmistakably that it was their appointed province to decide whether the condition precedent to the exercise of their authority to issue the bonds had been complied with. See Commissioners v. Nichols, 14 Ohio, N. S. 260. They did not decide the question before they issued the bonds. Their statement, verified by their affidavit, filed in the county clerk's office, was a decision, and the recital in the bonds was a declaration of the decision. That such a decision concludes the town against denying that the condition precedent had been performed; that it relieves the holder of the bonds from the obligation to look beyond it, is too firmly settled in this court to admit of question. In Dillon on Municipal Corporations, section 418, the author, after reviewing the decisions, states this conclusion: "If, upon a true construction of the legislative enactment conferring the authority, the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their recital of their determination of a matter *in pais*, which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation." Here, there was more than a recital. There was in addition proof of an actual decision, verified by oath. Without citing the numerous decisions which sustain this statement of the law, we refer only to St. Joseph Township v. Rogers, 16 Wallace, 644, and The Town of Coloma v. Eaves, decided at this term, which unequivocally assert it. And the rule has additional reason in its favor, where, as in the present case, the authority of the municipal officers to bind the municipality is made dependent upon a precedent condition of fact, and the fact is not of a nature to be ascertained by purchasers in the market, to whom it was contemplated the bonds might be sold. Dillon, in section 419, states this as another exception to the rule that an unauthorized representation by a municipal officer that he has power is not binding on the corporation. His language is: "The only exception to this rule (the rule above stated), to wit, where it is the sole province of the officers who issued the bonds to decide whether conditions precedent have been complied with, is where both parties have not equal means of knowledge as to the extent and scope of their powers, and where the particular character of their commission and authority is, from its nature and circumstances, peculiarly known to the officer or agent; in which case the principal will, or may be, bound by the false representations of the agent respecting its authority and its extent and scope." The present is exactly such a case. The town officers had means of knowledge the purchaser had not. They procured the signatures to the assent, and they knew whether or not they were genuine. They had knowledge which from the nature of the case, the purchaser could not have.

We are aware that in the State of New York it has been held adversely to the opinions we have expressed. It was so held in Starin v. The Town of Genoa, and in Gould v. The Town of Sterling, 23 N. Y. 439 and 456. In the former case, the court ruled that under the act of April 16, 1852 (the same act which conferred powers conditionally upon the supervisors and commissioners of the town of Venice), the onus was on the bondholder to show, in a suit against the town, that two-thirds of the resident taxables had given their written assent to the creation of the bonds. In the latter case, a similar decision was given when bonds had been issued under another act, much like the act of 1852, though differing in some material particulars. These decisions are in conflict with the rulings of this court in Bissell v. Jeffersonville, 24 How. 287; Knox County v. Aspinwall 21 How. 539; Mercer County v. Hackett, 1 Wall. 83, and other cases which we have cited. They are in conflict also with decisions in other state courts. Society for Savings v. New London, 29 Conn. 174; Railroad Company v. Evansville, 15 Ind. 395; Comm'ers v. Nichols, 14 Ohio, N. S. 360. We have carefully considered the reasons given for the judgments in the New York cases without being convinced by them. They ignore the paramount purpose for which the bonds were authorized by the legislature, and they treat the written assent of the taxables as the authority to the township officers, when, in fact, the power was given by the legislature, and it was only left to the town to determine by the action of two-thirds of the resident taxables whether the supervisors and commissioners might act under the power. In Gould v. Sterling the legislative act required no affidavit to be filed with a statement of the assenting tax-payers, and in Starin v. Genoa the affidavit filed was regarded as merely verifying that the persons whose names appeared on the assents comprised two-thirds of all the resident tax-payers. But it is obvious that if no more than this was meant by the required affidavit, it was wholly useless, for the assessment rolls of the township would have shown as much.

The authority of Starin v. Genoa has not been increased by the subsequent action of the New York courts. In The People v. Mead, 24 N. Y. 114, the ruling was followed; but Judge Denio, who only gave an opinion, claimed that the decision in Starin v. Genoa had been made on the ground that the bonds were not issued upon a loan, and that the plaintiff was not a *bona fide* holder. The People v. Mead came again before the court of appeals in 36 N. Y. p. 224, when Davis, J., said: "We do not think it seemly to review and reverse the former judgment of this court in this action upon the same facts;" and Grover, J., said: "But for the previous adjudication of this court I should have held that the affidavit filed with the clerk of Cayuga county, pursuant to the 2d section of chapter 375, of laws of 1852, was conclusive evidence of the assents of the tax-payers of the town, required by the act in favor of a *bona fide* holder of the bonds issued under its provisions." But assuming that what was ruled in Gould v. Sterling and in Starin v. Genoa, is still the doctrine of the New York courts, we find ourselves unable to yield to it our assent. It is against the whole current of our decisions, as well as against the decisions made in other states, and we think it is not supported by the soundest reasons.

It is argued, however, that the New York decisions are judicial constructions of a statute of that state, and, therefore, that they furnish a rule by which we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction. But they do not. They are not attempts at interpretation. They would apply as well to the excution of powers or authorities granted by private persons as they do to the issue of bonds under the statute of April 16, 1852. They assert general principles, to wit, that persons empowered to borrow money and give bonds therefor, for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to the company, a doctrine denied in this court, in the Supreme Court of Pennsylvania, and even in the Court of Appeals of New York, People v. Mead, 24 N. Y. 124; The Town of Venice v. Breed,— N. Y. —. They assert, also, that where an authority is given to an officer to execute and issue bonds, (on the assent of two-thirds of the voters of a town, the assent to be obtained by the officer and filed in a public office, with an affidavit verifying the assent,) the verification amounts to nothing, subserves no purpose, and that a *bona fide* holder of the bonds is bound to prove that the requisite number of voters did actually assent. They assert this as a general proposition. They do not assert that the statute so declares, or that such is even its implied requisition. There is, therefore, before us no such case of the construction of a state statute by state courts as requires us to yield our own convictions of the right and blindly follow the lead of others, eminent, as we freely concede, they are.

We have treated the case thus far on the assumption that the plaintiff below was a *bona fide* holder of the bonds which he put in suit. That he was such abundantly appears, and nothing that was offered at the trial tended in the slightest degree to show the contrary. Even the railroad company itself, when it took some of the bonds and gave its stock therefor, could have had no reason to suppose that every condition precedent to their issue had not been performed, and a subsequent purchaser, at any time prior to the time fixed for their final payment, must be regarded as a *bona fide* purchaser.

We have thus considered all the assignments of error that deserve particular notice, and all that were much pressed at the argument. The others are without the least merit. In our opinion, the law and the plainest dictates of justice demand an affirmance of this judgment, and it is accordingly affirmed.

No. 54. The Town of Genoa v. James O. Woodruff and Daniel McCauley.

Error to the Circuit Court for the Northern District of New York.

STRONG, J.

Twenty-six errors have been assigned in this case, not one of which can be sustained. All which have the least plausibility have been considered and declared unfounded in The Town of Venice v. Murdock, No. 53 of this term, and the others might well be dismissed without special notice. The thirteenth complains that the circuit judge decided the plaintiffs could recover interest upon the coupons from the time they fell due. That the ruling was correct is perfectly plain. It was in entire accordance with the decisions generally of the state courts, and also of this court.

The other assignments have either been answered in Venice v. Murdock, or they are totally without merit.

The judgment is affirmed.

No. 55. The Town of Venice v. James O. Woodruff and Daniel McCauley.

No. 56. Same v. William M. Matson.

No. 90. Same v. Opher Edson.

Error to the Circuit Court for the Northern District of New York.

STRONG, J.

These cases are in all essential particulars like the case of The Town of Venice v. Murdock, No. 53, decided at this term, and the judgments are affirmed for the reason given in that case.

Judgment in each case affirmed.

Raised Check—Liability of Purchaser and Drawee.

CITY BANK OF HOUSTON v. FIRST NATIONAL BANK.

Supreme Court of Texas, January Term, 1876.

A check for twenty dollars, drawn on the First National Bank of Houston, was fraudulently altered and raised by the payee to two thousand dollars. It was purchased of him by J. & Co., who endorsed it to their agents, the City Bank of Houston, who presented it to the First National Bank, and it was by said bank pronounced good. In the usual course of business it was taken up by the First National Bank in the exchange of checks after bank hours. The City Bank thereupon gave J. & Co. credit for the amount. The forgery was not discovered until the next month, on the balancing of the accounts between the two banks. *Held*, that the National Bank was entitled to recover the amount from the City Bank, as money paid under a mistake of fact.

Argument 1. The endorsement of the check by J. & Co., and by defendant, was a warranty that it was genuine, and the payment being made under a mistake, and to a party who substantially contracted that there was no such mistake, the bank, being under no such obligation, and not being otherwise estopped, is entitled to recover the money.

Argument 2. The loss having been incurred by J. & Co., the purchasers of the check, at the time they purchased it, the subsequent mistake of the plaintiff in paying it to defendant, the agent of J. & Co., should not shift the loss, unless defendant or J. & Co. had been damaged by the laches of plaintiff.

Argument 3. The purpose of the presentation of the check to plaintiff by defendant, was simply to be informed as to the signature of the drawer and the state of his account.

GOULD, J., delivered the opinion of the court.

This suit was brought by the First National Bank of Houston, to recover of the City Bank of Houston the sum of $1,980.00, alleged to have been paid by mistake. A brief history of the transaction will be necessary. On February 19th, 1872, the Texas Banking and Insurance Company of Galveston issued to a stranger, claiming the name of D. J. Wallace, the following check:

$20. THE TEXAS BANKING AND INSURANCE CO.
GALVESTON, February 19, 1872.

Pay to the order of D. J. Wallace, in current funds, twenty dollars.
No. 364. ALPHONSE LAUVE, Cashier.

To First National Bank, Houston.

After its issuance, this check was fraudulently altered so as to read as follows:

$2000. THE TEXAS BANKING AND INSURANCE CO.
GALVESTON, February 17, 1872.

Pay to the order of D. J. Wallace, in current funds, two thousand dollars.
No. 364. ALPHONSE LAUVE, Cashier.

To First National Bank, Houston.

In this altered condition the check was, on February 25th or 26th presented to plaintiff, but the party presenting failed to identify himself satisfactorily as the payee Wallace, and payment was refused. At the time, Wallace was accompanied by Mr. Gray, assistant teller of the City Bank, who said: "This is Mr. Wallace, or a man of that name, who keeps an account with us, that is under that name." This was deemed insufficient, and Gray refusing to endorse for him, payment was refused.

On or about March, 4th, the altered check was purchased by C. R. Johns & Co., a banking firm at Austin, Texas, of a party who was introduced to them by a person known to them, as D. J. Wallace, and who in that name endorsed to them the check. They endorsed it to their correspondent and agent, the City Bank of Houston, for the purpose of collection. On the morning of March, 6th, the check thus endorsed was presented by the City Bank to the National Bank, and was by the latter pronounced good, and on the evening of that day, in accordance with the custom of these banks, the City Bank endorsed the check and received credit for the amount as so much cash. When the check was pronounced good, the City Bank gave Johns & Co. credit for the amount, and notified them of the fact.

It was the custom of the Texas Banking and Insurance Company, and the First National Bank of Houston to transmit to each other, between the 1st and 3d of each month, an account current, showing the transactions between them for the preceding month. This account for February had been transmitted and received by the First National Bank, and entered up by its book-keeper, before the presentation of the check on March 6th, and showed check No. 364 to be for $20, and of date February 19th, and of course did not show any check corresponding to the one paid. On the 3d day of April, on the interchange of accounts for the month of March, the alteration of the check was discovered, or at least suspected, and after enquiry of, and hearing from the drawer, was made known at once to the defendant, and the check was examined at this time by the officials of both banks, who detected no evidence of its having been altered.

The facts seem only to have been fully ascertained some days afterward, after a trip by the president of the National Bank to Galveston, made for the purpose, and personal demand for the return of the money was not made until April 9th. The defences set up were, that the plaintiff had notice that no such check had been drawn on them at the time of the payment; that the check, prior to any endorsement by defendant, had been submitted to the plaintiff and pronounced by it to be good, thereby virtually accepting the same, and that upon the faith of that acceptation, defendant endorsed said check, and credited their correspondents with the amount thereof; that by the negligence of the plaintiff, in failing to inform defendant that the check was raised, all remedy against Wallace had been lost, and that by this negligence, and by its acceptance, plaintiff was estopped. It was also alleged that the drawer of the check had been guilty of a negligence in failing to use a perforating instrument, then used by bankers.

The evidence disclosed the facts already stated. There was no evidence that the interchange of monthly accounts was adopted for the purpose of detecting forgeries or alterations, or that there was any custom of bankers to refer to such accounts before paying the checks of their correspondents, though one witness said as a matter of prudence he would do so. On the other hand, there was evidence that such a use of these accounts by the paying teller would be unusual, and that they were used for the purpose of correcting errors, striking balances, and seeing that books agree. The book-keeper examined them, compared them with the books, and reported to the cashier. The same book-keeper entered up cash at night, the checks paid that day. The book-keeper who entered up the payment of $2,000, on check No. 364, on the night of March 6th, had already examined the account current, which showed that check to be for $20, but testifies that he did not detect the discrepancy until the next monthly account was received. The evidence showed that it was customary to collect checks between the banks by presenting them in the morning for recognition, and if they were pronounced good, or all right, they were considered as paid. The transaction was consummated on the afternoon of the same day, when the checks were endorsed and treated as so much cash.

Everett, a member of the firm of C. R. Johns & Co., testified that they were first advised of the check being raised by letter from the cashier of the City Bank on April 11; that he at once commenced search for Wallace, but did not find him. Had he been promptly advised of the forgery, thinks he could have overtaken or found Wallace. If he had been telegraphed ahead twenty-four hours, don't think Wallace could have got out of the state without his catching him; considers his recovery from Wallace entirely lost.

There is no other evidence whatever, as to damage resulting from the delay to discover and give notice of the forgery, unless it be the statement of the cashier of Johns & Co., that he paid Wallace $2,000 for he check; that Wallace was introduced by a person whom he believed responsible; thought they would have recourse on him; but did not know that the money could be made out of him. It does not appear to be seriously contended that the Texas Banking and Insurance Company was guilty of any negligence in the manner of drawing the genuine check No. 364, though there is some evidence in regard to the utility of a perforating instrument in preventing the successful alteration of checks.

So much of the charge of the court as is material, is as follows:

"2. If you believe from the evidence that the check in evidence was, without negligence in the manner of its drawing, drawn by the Texas Banking and Insurance Company of Galveston, in favor of D. J. Wallace for twenty dollars, ($20); was, after it came to the possession of Wallace, raised by him so as to make it a check for two thousand dollars, ($2,000); and after such material alteration, sold and endorsed it to C. R. Johns & Co., par value, and without notice to Johns & Co. of such alterations; and if Johns & Co. sent through their correspondent, the City Bank of Houston, who in due and usual course of dealings, collected same from the First National Bank of Houston, and passed the same up to the credit of Johns & Co. on the books of the City Bank; if you further believe from the evidence, that within a reasonable time after discovery of the alteration, the First National Bank notified the City Bank of such alteration, find for the plaintiff $1,980, at eight per cent. per annum, interest thereon from date of notice to the City Bank, against City Bank, and find over in favor of City Bank against Johns & Co.

"3. If satisfied from the evidence that when plaintiff paid the check it knew that the same had been altered and raised, then it can not recover; you to ascertain from all the evidence whether in fact plaintiff, when it paid to the City Bank the $2,000, knew of the forgery.

"4. If from the evidence you are not satisfied that there was any alteration in the check after its delivery by the drawer, find for defendant.

"5. If the endorser took the check from the payee after its alteration in a material respect, from a stranger, without enquiry, although in good faith, for value, and gave it currency and credit by endorsing it before receiving payment of it, the drawer may recover back the money paid."

The defendant, amongst other instructions, asked the following which, was refused:

"7. If the plaintiff had notice at the time of paying the check that its corresponding check for that number was for but $20, it is no excuse for the plaintiff that its officers had forgotten or failed to look at the information at the time of paying the check. Notice to the bank is binding

upon the bank, no matter how the duties of its subordinate agents may be arranged.

"8. If the First National Bank of Houston was advised on the day (or before) of the payment of the check that their corresponding check for that number was a twenty-dollar, and not a two-thousand-dollar check, and neither the defendant nor interveners had such notice, then the plaintiff can not excuse itself in delaying, for more than a month, to advise the holder of the forgery, and such delay is negligence, which entitles the defendant to recover.

"9. If you believe from the evidence that the defendant, before endorsing the check, had the same presented to the plaintiff for recognition and credit, and was induced by the declaration of plaintiff that the check was good to credit C. R. Johns & Co. with the face of the check, and to endorse the name of the defendant on the check before payment to defendant, then the plaintiff is estopped from now recovering the amount paid, from defendant, and you will find for defendant.

"10. That if you believe that the plaintiff, at the time of paying said check, had information from the drawer of the same that the check having the number of the one described in the petition was but for twenty dollars originally, and defendant obtained the check in good faith, and had no such information, then plaintiff can not recover, and you will find for defendant."

It should be remarked that Johns & Co. intervened in the case, and assisted in the defence.

There was a verdict and judgmer t for the plaintiff, from which the defendant appealed; the errors assigned and urged being in the charge of the court as given, and the refusal of the charges asked.

Under the evidence, we think that the plaintiff was entitled to recover, and that there is no error in the instructions given or refused, requiring a reversal of the cause.

The endorsement of the check by Johns & Co., and by defendant amounted to a representation and warranty that it was genuine. 2 Parsons on Notes and Bills, p. 589 and references.

The plaintiff might well rely on this responsibility of defendant, and make payment when demanded, secure in being reimbursed if the check should prove to have been raised. Morse on Banking, p. 310; Ellis & Morton v. Ohio Life and Trust Co., 4 Ohio St. 628.

The payment being made under a mistake, and to a party who substantially contracted that there was no such mistake, the bank, being under no such obligation, and not being otherwise estopped, is entitled to recover the money.

The general rule is that money paid under a mistake of fact may be recovered back, and that, too, although the party may have had the means of knowledge. 1 Story on Contracts, Section 410, p. 422 and references; Kelly v. Solari, 9 Meeson & Wellsby, 54; Wait v. Leggett, 8 Cowen, 195; Bell v. Gardner, 4 Mann. & Gran. 11. See also Kerr on Fraud and Mistake, p. 415 and references.

In the recent case of the National Bank of Commerce v. The National Mechanics' Banking Association (N. Y. Court of Appeals, 1874), the court says: "On general principles mere negligence in making the mistake is not sufficient to preclude the party making it from demanding its correction. Such negligence does not give to the party receiving the payment the right to retain what was not his due, unless he has been misled or prejudiced by the mistake. If the loss had been incurred and become complete before the payment, he should not in justice be permitted to avail himself of the mistake of the other party, to shift the loss upon the latter."

In this case it is evident that the loss had been incurred by Johns & Co. when they purchased the raised check from an irresponsible party. The subsequent mistake of the plaintiff, in paying this altered check to the defendant, the agent of Johns & Co., should not serve to shift the loss, unless the defendant or Johns & Co. had been damaged in some way by the laches of plaintiff, or unless there is some rule of law prohibiting the latter from setting up the mistake.

If the forgery had been in the signature of its correspondent, it is well settled that there is a rule of law forbidding the bank from setting up such a mistake. Morse on Banking, p. 295 and references; Price v. Neal, 3 Burr. 1355; Bank of U. S. v. Bank of Ga., 10 Wheaton, 333. In such a case the mistake is covered by a failure on the part of the bank to fulfill its acknowledged duty—that is, to know the signature of its correspondent or customer. Id.

But it is now also settled that this rule does not apply to altered or raised checks; as to which the acceptor or drawer is not presumed to be better able than the endorser to detect the alteration. Bank of Commerce v. Union Bank of N. Y., 3 Comstock, 230; Espy, Heidelbach & Co. v. First National Bank of Cincinnati, 18 Wallace, 604; National Park Bank v. Ninth National Bank, 55 Barb. 87.

If the plaintiff is estopped in this case, it is not because of any rule peculiar to the mercantile law, but because the facts bring the case within the general principles of estoppel. It is true that there are early authorities which hold a party paying a forged draft to great diligence in giving notice. The modern doctrine is believed to be, that as against one who passes a forged bill or check, and especially in favor of a drawee who pays to such a party on the faith of his endorsement, and in so doing violates no obligation or duty, reasonable diligence is all that can be required, and when that is exercised and no damage has resulted from the delay, the right to recover is not lost. 2 Parsons on Notes and Bills, pp. 598, 598 and references; Nat. Bk. of Com. v. Mechanics' Bank of N. Y., and 18 Wall. *supra*; 3 Comstock *supra*.

In this case there is no evidence which would support a verdict to the effect that the delay in detecting and giving notice of the forgery after March 6th, has deprived defendant, or Johns & Co., of any remedy, or has in anywise injured either of them. It is not shown that Wallace remained in Austin, or in reach of Johns & Co. for a single day after the sale on the fourth. The opinion of Everett, that he could have overtaken him if he had received notice in twenty-four hours, is not evidence which would support a verdict of damage.

Because then there was no evidence of damage to defendant or to C. R. Johns & Co., from the alleged negligence or delay of the plaintiff, the refusal of the court to give the instructions asked becomes immaterial.

Under the evidence it satisfactorily appears that the presentation of the check for recognition as good, was not for acceptance, but was really a mode of payment, and adopted for the covenience of the banks. The payment was consummated on the settlement of the day's transaction. Certainly there was no evidence to justify the charge asked on that subject and because there is nothing to indicate that the presentation, if not for payment, was intended or understood to be for any other purpose than to be informed as to the signature of the drawer and the state of his account. 18 Wallace, *supra*. Because we find no error, the judgment is affirmed.

Railway Aid-Bonds—Performance of Conditions Precedent.

THE TOWN OF COLOMA v. EVANS.

In the Supreme Court of the United States, October Term, 1875.

Where an act of legislature incorporated a railroad company, with power to build and operate its road, and authorized the executive officers of certain towns to subscribe for its capital stock in the name of the town, and issue in payment its bonds to the company, *provided* a majority of all the voters of the town shall at an election favor such subscription, which fact shall appear by the sworn statement of the town clerk filed with the county clerk, showing the vote, amount voted, etc.,—*Held*, in a suit brought against the town by a *bona fide* holder of bonds so issued (the bonds reciting the said legislative act), that it is not an open question whether all the prerequisites to the issue of the bonds have been complied with. The persons appointed to decide, having decided and certified their decision, the matter has passed into judgment. Their recitals are a decision declaring the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. The *bona fide* purchaser is not bound to look beyond these recitals for evidence of the existence of things *in pais*.

Mr. Justice STRONG delivered the opinion of the court.

It appears by the record that the plaintiff is a *bona fide* holder and owner of the coupons upon which the suit is founded, having obtained them before they were due and for a valuable consideration paid. The bonds to which the coupons were attached were given in payment of a subscription of $50,000 to the capital stock of the Chicago and Rock River Railroad Company, for which the town received in return certificates of five hundred shares of $100.00 each, in the stock of the company. That stock the town retains, but it resists the payment of the bonds, and of the coupons attached to them, alleging that they were issued without lawful authority. Saying nothing at present of the dishonesty of such a defence while the consideration for which the bonds were given is retained, we come at once to the question whether authority was shown for the stock subscription and for the consequent issue of the bonds. At the outset it is to be observed that the question is not between the town and its own agents. It is rather between the town and a person claiming through the action of its agents. The rights of the town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority. By an act of the legislature of Illinois, the Chicago and Rock River Railroad Company was incorporated with power to build and operate a railroad from Rock Falls on Rock river to Chicago, a distance of about one hundred and thirty miles. The tenth section of the act enacted that "to aid in the construction of said road, any incorporated city, town, or township, organized under the township organization laws of the state, along or near the route of said road, might subscribe to the capital stock of said company." That the town of Coloma was one of the municipal divisions empowered by this section to subscribe fully appears, and also that the railroad was built into the town before the bonds were issued. But it is upon the eleventh section of the act that the defendant relies. That section is as follows: "No such subscription shall be made until the question has been submitted to the legal voters of said city, town, or township in which the subscription is proposed to be made. And the clerk of such city, town, or township is hereby required, upon presentation of a petition signed by at least ten citizens, who are legal voters and tax-payers in such city, town, or township, stating the amount proposed to be subscribed, to post up notices in three public places in each town or township; which notices shall be posted not less than thirty days prior to holding such election, notifying the legal voters of such town or township to meet at the usual places of holding elections in such town or township, for the purpose of voting for or against such subscriptions. If it shall appear that a majority of all the legal voters of such city, town, or township voting at such election have voted 'for subscription,' it shall be the duty of the president of the board of trustees, or other executive officer of such town, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such city, town, or township, the amount so voted to be subscribed, and to receive from such company the proper certificates therefor. He shall also execute to said company, in the name of such city, town, or township, bonds bearing interest at ten per cent. per annum; which bonds shall run for a term of not more than twenty years; and the interest on the same shall be made payable annually; and which said bonds shall be signed by such president or supervisor, or other executive officer, and be attested by the clerk of the

city, town, or township in whose name the bonds are issued." Section 12 provides, "It shall be the duty of the clerk of any such city, town, or township in which a vote shall be given in favor of subscriptions, within ten days thereafter, to transmit to the county clerk of their counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid."

Most of these provisions are merely directory. But, conceding as we do, that the authority to make the subscription was, by the eleventh section of the act, made dependent upon the result of the submission of the question whether the town would subscribe, to a popular vote of the township, and upon the approval of the subscription by a majority of the legal voters of the town voting at the election, a preliminary enquiry must be, how is it to be ascertained whether the directions have been followed? whether there has been any popular vote, or whether a majority of the legal voters present at the election did in fact vote in favor of a subscription? Is the ascertainment of these things to be before the subscription is made, and before the bonds are issued, or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the statute. Its avowed purpose was to aid the building of the railroad by placing in the hands of the railroad company the bonds of assenting municipalities. These bonds were intended for sale, and it was rationally to be expected that they would be put upon distant markets. It must have been considered that the higher the price obtained for them, the more advantageous would it be for the company, and for the cities and towns which gave the bonds in exchange for capital stock. Everything that tended to depress the market value was adverse to the object the legislature had in view. It could not have been overlooked that their market value would be disastrously affected if the distant purchasers were under obligation to enquire before their purchase, or whenever they demanded payment of principal or interest, whether certain contingencies of fact had happened before the bonds were issued; contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the legislature had in view, namely, aid in the construction of the road. Such an interpretation ought not to be given to the statute, if it can reasonably be avoided. And we think it may be avoided.

At some time or other it is to be ascertained whether the directions of the act have been followed, whether there was any popular vote, or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all, and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met. This presumption is strengthened by the provisions of the twelfth section, which make it the duty of the clerk to transmit to the county clerk a transcript or statement, verified by his oath, of the vote given, with other particulars, in case a subscription has been voted. How is he to perform this duty if he is not to conduct the election and to determine what the voters have decided? If, therefore, there could be any obligation resting on persons proposing to purchase the bonds purporting to be issued under such legislative authority, and in accordance with a popular vote, to enquire whether the provisions of the statute had been followed, or whether the conditions precedent to their lawful issue had been complied with, the enquiry must be addressed to the town clerk or executive officer of the municipality; to the very person whose duty it was to ascertain and decide what were the facts. The more the statute is examined, the more evident does this become. The eleventh section (quoted above) declared that if it should appear that a majority of the legal voters of the city, town, or township voting had voted for "subscription," the executive officer and clerk should subscribe and execute bonds. "If it should appear," said the act. Appear, when? Why, plainly, before the subscription was made and the bonds were executed, not afterwards. Appear to whom? In regard to this there can be no doubt. Manifestly not to a court after the bonds have been put on the market and sold and when payment is called for, but if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to issue the bonds if the vote appeared to them to justify such action under the law. These persons were the supervisor and town clerk. Their right to issue the bonds was made dependent upon the appearance to them of the performance of the conditions precedent. Some person or persons was certainly to decide this preliminary question, and there can be no doubt who was intended by the law to be the arbiter. In Commissioners v. Nichols, 14 Ohio St. 260, it was said that "a statute in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock subscriptions, or otherwise, to complete a certain railroad, and imposing upon them the duty of delivering the bonds when such provision had been made, without indicating any person or tribunal to determine that fact, necessarily delegates that power to the commissioners; and, if delivered improvidently, the bonds will not be invalidated."

In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed were those whose duty it was also to issue the bonds in the event of such performance. The statute required the supervisor or other executive officer not only to subscribe for the stock, but also, in conjunction with the clerk, to execute bonds to the railroad company in the name of the town for the amount of the subscription. The bonds were required to be signed by the supervisor or other executive officer, and to be attested by the clerk. They were so executed. The supervisor and the clerk signed them, and they were registered in the office of the auditor of the state, in accordance with an act requiring that precedent to their registration the supervisor must certify under oath to the auditor that all the preliminary conditions to their issue required by the law had been complied with. On each bond the auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they "are issued under and by virtue of the act incorporating the railroad company," approved March 24th, 1869, "and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law." After all this it is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue have been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision, and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency, but whether that has happened or not, is a question of fact, the decision of which is by the law confided to others, to those most competent to decide it, and which the purchaser is, in general, in no condition to decide for himself.

This we understand to be the settled doctrine of this court. Indeed, some of our decisions have gone farther. In the leading care of Knox v. Aspinwall, 21 How. 544, the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with, and it was said the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the Royal British Bank v. Torquand, 6 Ellis & Blackburn, 327, a case in the Exchequer Chamber, which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in Knox v. Aspinwall, has been more than once reaffirmed in this court. It was in Moran v. Miami County, 2 Black, 732; in Mercer County v. Hackett, 1 Wall. 83; in Supervisors v. Schenk, 5 Wall. 784, and in Mayor v. Muscatine, 1 Wall. 384. It has never been overruled, and whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in Knox v. Aspinwall. That, we think, has been so firmly seated in reason and authority that it can not be shaken. What it is has been well stated in section 419 of Dillon on Municipal Corporations. After a review of the decisions of this court, the author remarks: "If upon a true construction of the legislative enactment conferring the authority, (viz., to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais*, which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation." This is a very cautious statement of the doctrine. It may be restated in a slightly different form. Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal. In Bissell v. Jeffersonville, 24 How. 287, it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three fourths of the legal voters of the city. The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription. A similar ruling was made in Van Hostrop v. Madison City, 1 Wallace, 291, and in Mercer County v. Hackett, 1 Wallace, 83.

The same principle has recently been asserted in this court after very grave consideration, and it must be considered as settled. In St. Josephs Township v. Rogers, 16 Wall. 644, it is stated thus: "Power to issue bonds to aid in the construction of a railroad, is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions, or qualifications, but if it appears by their recitals that the

bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all these recitals were incorrect, will not constitute a defence for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification, which it is alleged was not fulfilled."

There is nothing in the case of Marsh v. Fulton, 10 Wall. 675, to which we have been referred, at all inconsistent with the rule thus asserted. In that case there were no recitals in the bonds, and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open. What we have said disposes of the present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown, and even if it had been admissible, the effort to assimilate the case to Marsh v. Fulton, would fail. There the subscription was for the stock of a different corporation from that for which the people had voted. Here it was not.

The judgment of the circuit court is affirmed.

Mr. Justice BRADLEY delivered the following concurring opinion.

I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of Knox County v. Aspinwall, to-wit: that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed, is conclusive proof of its performance. If, when the law requires a vote of tax payers, before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute and who does execute the bonds; and if the bonds themselves contain a statement or recital that such vote has been given, then, the *bona fide* purchaser of the bonds need go back no further. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital, is not, in my judgment, conclusive. It may be *prima facie* sufficient; but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject, and I do not think that the contrary has ever been decided by this court. There have been various *dicta* to the contrary, but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bonds, according to my view of the case. This view was distinctly announced by this court in the case of Lynde v. The County of Winnebago, 16 Wall. 13. In the case now under consideration, there is a sufficient recital in the bond to show that the proper election was held and the proper vote given; and the bond was executed by the officers whose duty it was to ascertain these facts. On this ground, and this alone, I concur in the judgment of the court.

The Law of Homestead Exemption: Estate of the Survivor of the Marital Relation, in the Homestead, and the Rights of Creditors Therein.

In many of the states where homestead laws have been adopted, the courts have been called upon to adjudicate the rights of creditors holding liens on the lands used and occupied as homesteads. These cases of conventional liens in which the wife did not join, sometimes originated in the ignorance, either of law or fact, of the grantee; but more frequently in the actual fraud and misrepresentation of the grantor. These questions have sometimes been disposed of in a very summary manner, by declaring all alienations of the homestead property, by the sole deed of the husband, to be absolutely null and void. These decisions appear to have been hastily rendered without due consideration; and, to the reflecting lawyer, they are unsatisfactory, and do not appear to be founded on reason or authority.

If the land which is occupied as a homestead be the separate estate of the husband, and the wife should die, it is conceded by all authorities that the husband may then freely alienate or encumber it. But if he should do so during the life-time of the wife without her joining in the instrument, and then die himself; or should he die without any such disposition, what then becomes of, and is the *status* of, the property, in each or either of these events?

To answer this question satisfactorily, it is necessary first, to enquire, what is the homestead? Does it include the whole estate—the fee simple absolute of the land occupied as a homestead or place of residence—or is it merely some right or estate therein, less than the fee? It must be either the one or the other; the fee must always reside somewhere; it can never rest in abeyance; if the statute does not fix and determine it, then the courts must do so in accordance with the well established rules of the common law in analogous cases.

The statutes of all the states having homestead laws, except Vermont and Missouri, are silent on this point. There the statutes declare that when the husband dies, the homestead shall wholly pass to his widow and children in due course of descent, without being subject to the payment of his debts. *Vide* Comp. Laws, Vt. (1850) p. 390, sec. 4, and Genl. Statutes, Mo. (1866) p. 450. Of course, the courts of those states, the laws of descent being plainly prescribed, hold that the widow and children take the land on which the homestead is situated, in fee.

But in no other state is there any such statutory provision, and what then is the course of descent? The land which is used and occupied as a homestead or residence, must be subjected to the same general laws of inheritance as other property. If, by the mere fact of its being used as a homestead or place of residence the fee is thereby absorbed in such use and occupation during the life-time of the two spouses, of course the survivor, still continuing to occupy it as a homestead, takes the fee upon the death of either. This conclusion is inevitable from the assumption, and let us see what would be its legitimate result. If "A" was possessed in his own right of a valuable estate, which is occupied as the homestead of himself and family, and he should die, leaving a wife and children, this construction would vest in his surviving widow, the homestead right including the fee in her deceased husband's separate property. This might work no very great injustice so long as she does not marry again, but if she marries a second husband, and then dies herself, the same rule of construction that gave her the fee in the homestead of herself and her first husband, would, on her death, vest the same estate in her second husband. And so the illustration might be carried out indefinitely. Thus, we see the separate estate of the first husband diverted from its regular course of descent, vested in a mere stranger to his blood, and his orphan children unjustly deprived of their rightful inheritance, by a forced and most iniquitous construction, dictated by a temporizing, short-sighted spirit of public policy. It is the most monstrous outrage ever perpetrated in the name of law. It not only violates the laws of inheritance, of descents and distributions, but is directly in conflict with that provision of every American constitution, "that no person shall be deprived of life, liberty, *property* or privileges, except by due course of the law of the land." It will scarcely be contended that this judicial legislation is the *lex terræ*.

Let us now examine the other view of the question. If the land on which the homestead is situated is the separate estate of the husband, and the fee is vested in him, it descends to his heirs as any other property, unless otherwise expressly regulated by statute. But it is the homestead, and he is forbidden by law to alienate it without the concurrence of his wife, in the manner required by law. What is it that he is thus prohibited from alienating? Is it the fee simple absolute title that is vested in him? Or is it the right to the use, occupation and enjoyment of the land as a homestead or place of residence by his family?

It has been seen that it can not possibly be the former, without violating the most sacred principles of law and justice; let us then enquire if it can be the latter.

It is believed that there is no reason why a freehold estate of homestead may not be carved out of the fee, as well as a remainder or reversion; nor why the law, by virtue of the marital relation, may not create the right or estate of homestead, out of the fee held by the husband or wife, as well as the estates of dower and curtesy. It is equally, with either, a less estate carved out of a greater. Dower is an estate for the benefit of the wife, to continue during her life, carved out of the husband's fee; curtesy is an estate for the benefit of the husband, to continue during his life, carved out of the wife's fee; and the homestead estate of the survivor of the marital relation, in the land of the other, is but an estate for the benefit of such survivor, to continue during his or her life, conditioned upon the premises not being abandoned as a place of residence.

The essential requisites of dower are marriage, seizin and death; those of curtesy are marriage, seizin, *issue* and death; and those of homestead are, marriage and seizin, or actual occupancy as a place of residence. Issue is not necessary; and death seems to have no effect on it, except when it annihilates the family; for it would seem, that if the family be entirely broken up, the homestead right or estate must necessarily terminate with it.

One of the ancient incidents of dower is the widow's quarantine; and it is so suggestive of the right or estate of homestead, as to raise the enquiry if it may not have been the foundation of this modern estate. To give greater facility to the attainment of dower, it was provided by *Magna Charta*, that the widow should tarry in the chief house, or mansion house, of her husband for forty days after his death, within which time her dower should be assigned; and that in the meantime, she should have reasonable estovers or maintenance. 4 Kent Com. 61. This was called the "*widow's quarantine*," and by some authorities is is said to have been extended by the ancient law to an entire year. Coke Lit. 32, *b*; Seider v. Seider, 5 Whart. 208.

It would be an interesting, and perhaps not unprofitable, study, to enquire if the present homestead right or estate is not an enlargement of the widow's quarantine, and an extension of its privileges to both spouses, for their benefit and that of their children.

Mr. Washburn says that the homestead right or estate partakes more nearly of the character of an estate for life than any other, but treats it as coming within that catagory. 1 Washb. Real Prop. 325. But some authorities refuse to dignify it as an estate at all. In discussing this question, the Supreme Court of Kansas uses the following language:

"We suppose it may also be said that the wife has, in one sense, an *estate* in the homestead occupied by herself and husband, although the title to the same may be in him; but still, if it is an estate, it is such an one as has never been defined by law; an estate unknown to the common law; technically, no estate at all. The whole estate in such a case is, in fact, wholly in the husband, with merely a restriction for the benefit of the family, upon his power to alienate. It is true, the wife has an interest in the homestead, a present and existing interest, an interest that will be protected by the courts; but it is simply an interest growing out of the marriage relation, and has no other or different foundation than the marriage relation and occupancy. It requires no instrument in writing to create or destroy it. A merely going upon the premises, and occupying them as a homestead, will create the interest, and an abandonment will destroy it. If the wife should die while occupying the premises as a homestead, she would leave nothing that could descend to her heirs, or go to her executors or administrators, and nothing that she could devise

or bequeath. The whole estate would continue to belong to her husband, and after her death, he could sell and convey the same by his sole deed. As we have said, the wife has a present and existing interest in the homestead, such as the courts will protect; but so she has in all the other property of her husband. Every man is bound to support and maintain his wife; and all his property, real and personal, is under continued pledge for such support." Jenner v. Cutter. 12 Kan. 516.

In Illinois the court say: "That right (the homestead) is not an estate, but simply a privilege conferred by statute, which ceases when the grantor and his family cease to occupy the property. As soon as he ceases so to occupy it, the right to hold it adversely to the fee is gone, and the grantee may enter and hold possession." Finley v. McConnell, 60 Ill. 259. In this case a party conveyed the house and lot on which he resided with his family, and the right of homestead was not released, nor did the wife join in the execution of the deed. The court held that the conveyance passed the fee, but subject to the right of the grantor to retain and occupy it as a homestead; but that when he abandoned it, the homestead right ceased. See, also, Vasey v. Board, 59 Ill. 188.

In Massachusetts the court say: "The right of homestead is a new species of estate created by statute, and unknown to the common law. But it seems to have all the incidents of a freehold estate, and to come within the definition given by elementary writers. It is an estate indeterminate in its duration, and which may continue for the joint lives of the possessor and his wife. That it is defeasible, does not change the quantity of estate while it continues." Kerley v. Kerley, 13 Allen, 287; Silloway v. Brown, 12 Id. 30.

Woodbury v. Luddy, 14 Allen, 1, was a case where the husband had given a bond to convey the homestead property, and in a suit for specific performance it was held, that although he could not be compelled to convey the property used as a homestead, yet the obligee was entitled to recover from him the excess of the tract over and above the homestead allowed by law, and awarded him compensation in the nature of damages for the deficiency, to the amount of the value of the homestead. In White v. Rice, 5 Allen, 76, the same court say: "It is an exemption of the parcel of land embraced in the homestead, from any attachment or conveyance by the debtor? Or is it merely an exemption of the homestead right, that is, the right of the husband and wife to use the same during their joint lives, and in case the wife should survive, for her benefit and that of her minor children? This is the extent of the duration of the homestead right; and if the exemption goes no further than to exempt this limited estate, then it would be competent for the husband to convey the reversionary right."

Doyle v. Coburn, 6 Allen 71, was a writ of entry to foreclose a mortgage, given by the defendant, of land which was subject to an estate of homestead for the benefit of the grantor and his family. The mortgage contained full covenants of warranty, but was not signed by the defendant's wife. There, the court say: "The mortgage deed undoubtedly conveyed the reversionary interest of the defendant in the premises. The homestead estate is not an estate in fee simple, but a limited estate, which may or may not continue for the life of the husband and wife, and for a term of years for their children, but in no event beyond that. It is this homestead interest that cannot be conveyed by the sole deed of the husband. Beyond the limited estate thus carved out, the husband has an estate in reversion, which may be the subject of sale or mortgage by him by his sole deed." See also Abbott v. Abbott, 97 Mass. 138.

The same court also held that a sheriff's sale under execution, of the judgment debtor's equity of redemption in mortgaged real estate, which the debtor claimed to be exempt from levy as a homestead, was not invalid, but conveyed his reversionary interest therein. Swan v. Stephens, 99 Mass. 7.

Also, that a mortgage of land which is subject to a right of homestead, conveys the reversionary interest of the mortgagor, after the expiration of the homestead estate, although the wife did not join therein; and that the mortgagee of such reversionary interest may maintain a bill in equity to redeem a prior mortgage. Smith v. Provin, 4 Allen, 516.

A still later case decides that the homestead right is a freehold estate for the life of the husband, and such further time as the widow and minor child should continue to occupy it; and that it cannot be affected by the will of the husband. Brethren v. Fox, 100 Mass. 235.

In New Hampshire, it is held that the husband may convey the entire property in which the right of homestead exists, subject only to that right; and that the mortgagee or purchaser under such mortgage or deed of the husband alone, will hold the estate subject to the homestead. Atkinson v. Atkinson, 37 N. H. 434; see also Fletcher v. Bank, Id. 396; Gunnison v. Twitchell, 38 Id. 62; Horn v. Tufts, 39 Id. 478; Meader v. Place, 43 Id. 307.

In Michigan, Judge Christiancy, in speaking for the court, of a conveyance by the husband of the land occupied as a homestead, in which the wife did not join, says: "The deed, without the signature of the wife, is void as against complainant's right to a homestead. But the right to a homestead in her husband's lands, is no more in the nature of sole property than the right of dower; and there is a striking similarity between them as to the question here involved." Bing v. Burt, 17 Mich. 471.

The Supreme Court of California hold that a sale by the husband alone, of the land occupied as a homestead, vests the estate in the vendee, subject only to the use and occupation by the grantor and his wife, until another homestead is acquired, or until the character of the premises as a homestead is otherwise gone. Gee v. Moore, 14 Cal. 472.

In this case, the court say: "The husband alone has the legal title to the homestead, and his absolute power of alienation is restricted only so far as is necessary to protect the homestead." See also Bowman v. Norton, 16 Cal. 213; McQuade v. Whaley, 31 Id. 528. In Rich v. Tubbs, the same court hold that the probate court, in setting apart for the use of the family of the deceased husband or wife, property which has been dedicated as a homestead, does not change or transfer the title, nor does it adjudicate the question of title. 41 Cal. 34.

In Georgia, it is held that the homestead is a particular estate carved out of the husband's fee, for the use of his family, and is protected from his debts and from alienation by him. "*Prima facie*," the court say, "it would seem to follow, that if, at any time, or in any manner, the family should cease to exist, the reversion would go over to the holder of the fee, since it is a particular estate taken out of the fee and set aside for the use of the family; and when this particular estate fails; the fee would receive it back." Heard v. Downer, 47 Ga. 631. See also, Kilgore v. Beck, 40 Id. 293, and Blevins v. Johnson, Id. 297.

In Texas, notwithstanding some cases to the contrary, there is a long line of well-considered decisions that support this doctrine, and establish beyond doubt, that the contract of the husband to convey the land used and occupied as a homestead, without the wife's concurrence, is not void.

The first of these is Stewart v. Mackey, 16 Tx. 57. There the court say: "The only question is, whether the mortgage, though ineffectual at the time of its execution, could be enforced subsequently, and after the homestead which had been mortgaged was abandoned and another one acquired. Were it not for the provision of the constitution, that the owner of a homestead, if a married man, should not be at liberty to alienate the same, unless by consent of his wife, the husband would have the unquestionable power to dispose of it at pleasure. His right, his absolute title in the property, is not affected, but his power of alienation is restricted for the distinct and specific purpose of securing a homestead to the family. The entire object of the law and the constitution is to secure a homestead, and no infringement upon the husband's rights of property, except such as may be necessary for the object designed, is intended by the law, or is to be presumed. Under this view, the husband may, in conformity with law, make any disposition whatever of the homestead, being his own property, provided his act does not interfere with the absolute right of enjoyment and use of the homestead by the husband, wife and family. There appears to be no necessity to encroach upon the husband's right of alienation, further than may be necessary to secure these objects; nor to inhibit a creditor from taking a mortgage from the husband, subject to the contingency that the homestead may not be changed, or that the wife may not assent, and that this claim may be barred by limitation." See also Primm v. Barton, 18 Tx. 206.

In Jordan v. Goodman, 9 Tx. 273, the husband, without the assent of the wife, conveyed the land occupied as a homestead, and they both removed out of the state. The husband died, and the wife returned and brought suit to recover the property, on the ground that she did not join in the deed, and that it was, therefore, a nullity. The court held that her removal amounted to a relinquishment, and that the sole deed of the husband was valid to convey the whole estate.

Brewer v. Wall, 23 Tx. 589, was a suit to compel specific performance of the husband's bond to convey the land occupied as a homestead. The wife did not join in the bond. The court held that the bond was not void. The court say: "It is true that while the premises remained the homestead of the obligor and his wife, the courts would not decree specific performance. But if the wife should die, or the family should acquire another homestead, then the courts might decree specific performance, because every legal obstacle thereto would then be removed."

Cross v. Everts, 28 Tx. 534, was a suit in the alternative, for specific performance or damages for the breach of the husband's bond to convey the land occupied as a homestead. Cross had agreed with Evert and wife to exchange lands. The Everts' tract was occupied by himself and wife as a homestead. Bonds were interchanged, but there was no privy examination of Mrs. Everts. After deciding that Cross had no cause of action against Mrs. Everts, the court proceeded to say: "Not so as to her husband. He is competent to bind himself in such an agreement as his demurrer admits that set out in the petition to be. And while specific performance cannot be enforced on account of the rights of the wife, he is clearly liable to respond in damages for its breach. See also Wright v. Hays, 34 Tx. 253.

O'Docherty v. McGloin, 25 Tx. 72, was a case where the husband gave to his son by will, the tract of land occupied by himself and family as a homestead. The will was duly probated, and the clause giving the homestead tract to the son was by the probate court declared to be null and void; and that court proceeded to set apart the homestead to the widow. On appeal, the supreme court say: "The order setting apart the homestead was certainly proper, irrespective of the disposition of the fee of the will. The action of the probate court will not affect injuriously appellant's ultimate right of property, or his estate in the fee in the property now occupied as a homestead. It is in no manner prejudicial to his right in the final distribution of the estate."

In Tieman v. Tieman, 34 Tx. 525, which was a divorce suit, the district court dissolved the marriage, and gave the wife the custody of the minor child, and decreed her the homestead, which was community property. The judgment decided that, "all the right, title and interest of the husband in and to the land constituting the homestead be divested out of him, and vested in the wife, and that he be enjoined from interfering with it." The supreme court reversed this judgment, and say: "We think the court very properly decreed her the *use* of the homestead, but it was not in the power of the district court to give her more than a life estate in it; and it must, therefore, be so amended that the plaintiff shall take under it the sole use and right to occupy the homestead for and during the term of her natural life."

In Peak v. Jordan, 38 Tx. 439, it is said that the fee of the homestead

property is in the husband, if it be community property. If so, the fee must also be in him when it is his separate property.

As this right or estate of homestead is carved out of the husband's fee, for the benefit of his family, and as the family cannot be perpetual, then when it ceases to exist, this particular estate that was created by operation of law for its benefit, must also cease with it, unless it has been previously terminated by abandonment.

In Misus v. Ross, 42 Ga. 121, it is held that the legatee of a specific bequest of real estate, under a will, who has the assent of the executor to the legacy, has not such a title as gives him a right to take a homestead therein, to the exclusion of the creditors of the testator. See, also, Tadlock v. Eccles, 20 Tx. 782. If the creditors of the husband have any rights in his reversionany interest in the fee of the estate out of which the privilege or particular estate of homestead is carved, then it is certainly competent for the courts to afford them a suitable remedy, to prevent their demands from becoming stale or barred by limitation, until such time as they may be enforced and satisfied without violating or disturbing the homestead.

It is evident that, from these authorities, the following propositions are clearly deducible:

1. The fee of the homestead is in the husband, unless it be the separate estate of the wife, and may be disposed of by his sole deed.

2. The estate of the wife in the homestead, which is either community, or the separate property of the husband, is a conditional estate for life.

3. The husband may, during the life-time of the wife, lawfully alienate the land occupied as a homestead, if it be either community or his separate property; and his guarantee will take the fee simple title to the land out of which the homestead estate is carved, subject to such particular estate of homestead.

4. The holder of any valid lien, judicial or conventional, upon the land occupied as a homestead, may enforce it against the reversionary interest of the husband therein, to prevent a bar by limitation, provided it is not attempted to disturb or interfere with the enjoyment of the particular estate or right of homestead.

And this doctrine, as maintained by these authorities, is in accord with the maxim, *alienatio rei præfertur juri accrescendi;* while the contrary is in sympathy with the feudal policy to create and encourage perpetuities.

There is, however, a well known principle of the common law, that may enter largely into, and have an important bearing on such conveyances of the homestead property by the sole deed of the husband. It is, that where a grantor attempts to convey a greater estate than he has, the conveyance is absolutely void and ineffectual to convey any, even that which he has. As there is a particular estate of homestead carved out of the husband's lands by operation of law, and his is merely an estate in reversion, when he attempts to convey the whole, it would probably come within this rule. But this principle can have no application where it is expressly altered by statute, as in Texas, and the conveyance made effectual to pass whatever estate the grantor may have less than the whole. Where this is the case, the foregoing propositions, as deducible from the authorities, would seem to be entirely applicable, and have their proper influence on the questions herein presented.

CHAS. I. EVANS.

AUSTIN, TX., April, 1876.

Correspondence.

A CARD.

EDITORS CENTRAL LAW JOURNAL:—Judge Sherwood in the case of Tower v. Moore, 52 Mo. 118, in commenting upon the conduct of the defendant (which was manifestly that of his attorney in the court below), characterizes it as a "feat of legerdemain, a thimble-rig performance." Since the name of the attorney who tried the case in the circuit court, although in the record, does not appear in the Report, but mine and that of my then partner do, it seems that we are the attorneys denounced.

The fact is, and the record shows it, we first came into the case while it was pending in the supreme court, and as for myself, I had not set foot in the state of Missouri or heard of the case until after it was tried in the circuit court and the record made up. I am of the opinion that where the conduct of a person is animadverted upon in such terms, and in so public and enduring a mode, that the judge in wording his opinion, and the reporter in publishing it, should take care that no innocent person suffers. This has not been done in this case, though the means for preventing the wrong were in the record and at hand, and the time for repairing it, after it was done, has been ample, and the opportunities numerous. Being averse to card writing, I have chosen to rest under the imputation for now about three years, in the hope that the facts in the case would become known to my acquaintances in a less public way than by means of a card.

I have recently discovered that it is believed by some attorneys whose good opinions I value, that I am one of the persons referred to, and that they infer from my silence that I confess the justice of the comment.

This card in your journal will reach the greater number of attorneys who use the Missouri Reports, and will I trust, convince them, to quote certain phrases for which late Reports are indebted to the legal vocabulary of Judge Sherwood, that I am justified in abandoning the "*passive policy*" (53 Mo. 65), that for three years has induced me to submit to the "*nice little arrangement*" (52 Mo. 27), of the Reporter, by which I have been held out to the members of the Missouri bar, as having been engaged in a "feat of legerdemain, a thimble-rig performance," but with which, whatever it be in fact, I had no more to do than had the Honorable Judge himself.

E. MCGINNIS.

Book Notices.

SUPPLEMENT TO WOOD & LONG'S DIGEST.—A Digest of the Illinois Reports, embracing all the Decisions of the Supreme Court of the State, from the fifty-fifth to the sixty-eighth Volume, inclusive. By CHARLES H. WOOD and JOSEPH D. LONG, of the Illinois Bar. Vol. III. Being a supplement. Chicago: E. B. Myers. 1876.

This volume brings down to the time of its going to press, a valuable work, with which the profession in Illinois are familiar. A cursory examination of it impresses us that it possesses all the characteristics of a firs-tclass digest. It is handsomely printed.

SAYLER'S STATUTES OF OHIO.—The Statutes of the State of Ohio, in continuation of Curwen's Statutes at Large and Swan & Critchfield's Revised Statutes, arranged in Chronological Order, showing the Acts Repealed, Obsolete or Superseded, with References to the Judicial Decisions construing the Statutes, and a complete Analytical Index. Edited by J. R. SAYLER. In four volumes. Cincinnati: Robert Clarke & Co. 1876.

The title-page of this noble work so completely indicates its scope that it is scarcely necessary to say a word in explanation of it. The advantage of preserving in permanent shape and historical order the entire body of the laws of a state, both those which were temporary in their nature, and those which have been repealed, need not be dwelt upon. In our judgment, the advantages of such publications to legislation and to the administration of justice, are so great that, in those states whose population is so small that such undertakings can not be carried through by private enterprise, it should be done at the public expense. We are not acquainted with the editor of this work, but the imprint of the house of Robert Clarke & Company is a guaranty, that he would not have been selected to perform such an important task, if he had not been a person entirely competent for it. Such a surface examination of these volumes as our opportunities permit us to make, impresses us that the work of the editor has been done with great care and fidelity. The copious and well-stated abstracts of judicial decisions expounding particular statutes, are especially to be pointed out as of great value. The fourth volume has a valuable table of "changes in prior laws," pointing out, by chapter and section, those which have been repealed or amended in the compilations of Chase and of Curwen. The index embraces 330 pages, and is especially to be commended for the great number of its titles and cross-references. The author evidently had a just view of the best manner of making an index, namely, to crumble everything down, as far as possible, to an alphabetical basis.

Queries and Answers.

QUERIES.

[In order to save space, queries inserted in the JOURNAL will hereafter be numbered consecutively during the year. In answering queries, correspondents are requested to give the number of the query answered.]

1. Removal of Cause—Depositions taken in State Courts.—If a cause is removed from a state court into the United State Circuit Court, under the act of 1875, after depositions have been taken and filed in the case in the state court, can such depositions or copies thereof be used in the circuit court? If so, by what authority? J. M. G.

[Our understanding is that they can. The fourth section of the act provides that "all injunctions, orders and *other proceedings* had in such suit prior to its removal shall remain in full force," etc.—ED. C. L. J.]

2. National Banks—Discounting Notes secured by Mortgages.—If the payee of a promissory note, which is secured by a real estate mortgage, procures the note to be discounted by a national bank, can the bank avail itself of the benefit of the mortgage? And if not, will a re-transfer of the note to the payee, re-invest him with the security? The case in 2 Dillon and in 72 Pa. St. and other like cases, do not seem to me to clearly answer the first queries. The case of Fort Dodge Bank v. Haire, 36 Iowa, 443, comes nearest. J. M. G.

3. Right of Action on Covenant of Warranty.—A made a deed of general warranty to B; B to C; C to D. D finds an incumbrance against the land, and which was a lien upon the land at the time A deeded to B. The incumbrance being taxes, can D bring suit against A to recover the amount paid out to satisfy the taxes, or is he, D, obliged to sue his grantee C, and C sue B, and so on? Or, in other words, are taxes such a covenant as runs with the land? PHI DELTA PHI.

4. Constitutionality of the Civil Rights Law of 1875.—What decisions have been made as to the constitutionality of the act of Congress, "An act to protect all persons in their civil and legal rights," of March 1, 1875? Would be obliged for the information. J. D. H.

5. Right of U. S. Government to tax Banks for Paying out "City Money."—Will you be so kind as to learn when and where a decision was made in reference to the authority the United States government has to tax your banks for paying out your "city money." I have seen the decision referred to in the papers some time since, but do not remember by what court the decision was made. It may be it was made by the treasury department.

6. Homesteads and Exemptions in West Virginia—What is a "Regulation" and what is an Infraction of the Right guaranteed by the Constitution?—The following letter addressed to Mr. Thompson privately, is inserted in this department of the JOURNAL:

Dear Sir:—As you are preparing a book on Homesteads and Exemptions—a subject of importance to all lawyers—and as I am a subscriber of your excellent CENTRAL LAW JOURNAL, I pursuaded myself that you would not construe a suggestion touching the homestead and exemption laws of this state [West Virginia] as presumptious.

In section 48 of chapter VI. of the constitution of 1871-2, of West Virginia, the following provision is found: "Any husband or parent residing in this state, or the wife and children of deceased parents, may hold a homestead of the value of one thousand dollars, and personal property to the value of two hundred dollars, exempt from forced sale, subject to such regulations as shall be prescribed by law." Then follow several provisions, but which are not germane to the subject of this letter. In chapter 193 of the Acts of the Legislature of West Virginia, 1872-3, section 2, it is declared that any husband, etc., "may set apart of his personal property not exceeding two hundred dollars in value, to be exempt from execution or other process, in all cases where the claim or cause of action arose out of contract." The question suggested by a comparison of the constitutional and legislative provisions is, Does not the legislature, in the law just cited, abridge or restrict the constitutional right of the husband, etc.? Or, putting it in another form, the constitution having ordained that the exemption should be from "forced sale," does not the superadded legislation conflict with the constitution? There may be a "forced sale" in cases where the claim arises out of tort as well as out of contract; and "forced sale," according to the Supreme Court of Texas, in the case of Sampson v. Williamson, 6 Tex., means "any sale made under process of court in the manner prescribed by law."

Again, would a "forced sale" of property of a defendant in a prosecution for misdemeanor by the state, to satisfy a judgment for fine and costs, be such a sale against which the defendant could protect himself by pleading the exemption? The policy and intention of the constitutional provision, seems to aim to protect the members of society from each other, not the resident or citizen from the state. Still, as the same constitution provides that there can be no exemption against taxes, the rule *expressio unius est exclusio alterius* may solve this question in the negative.

I call your attention to another law. In section 9 of the same chapter (193) of the acts just referred to, it is enacted that "any husband or parent desiring to obtain the benefit of such homestead (meaning the homestead, not the personal property exemption), shall make a declaration of such intention, and therein describe with convenient certainty such homestead; * * * which declaration of intention shall be acknowledged before some officer; * * * which the party shall have duly recorded in the clerk's office of the county court of the county in which such homestead is situated." Then succeeds this section: [10] "That no person after the first day of March next, [1874] who has not made and had recorded such declaration of intention, shall have the benefit of such homestead as to debts contracted before the recording of such declaration." The law which I have quoted is only part of a chapter. The entire chapter was the first law passed by the legislature of this state on the subject, and the only law. It was intended to establish the "regulations" mentioned in the section of the constitution I have cited. But the question has been much mooted whether the legislature, in the last sections quoted, did not transcend its power. Are the provisions therein contained, "regulations?" Do they not savor of provisions that limit the constitutional right? A circuit judge of this state, an able lawyer, has negatived this question. As you are writing a book on this subject, and I did not know of any homestead and exemption law of any other state similar to that of this state, I was pursuaded you might cast some light on the questions submitted. Yours, etc., D. F. PUGH.

MIDDLEBOURNE, W. VA.

[This is but one of numerous letters which Mr. Thompson has received on the subject of homesteads, since he was so improvident as to permit his publishers to announce that he had a work on the subject in preparation. Mr. Thompson takes this occasion to say to the many who have written him on the subject, that he has not done any work on his manuscript for some time, and does not expect to do any during the coming summer. A work on the subject, such as he is willing to publish, cannot be written in a day, nor in a year; and since the profession have been supplied by Mr. Smyth of California with a very useful compendium of the decisions on the subject, he does not not feel under any obligation to the bar to be in a hurry in completing his book. Mr. Thompson begs further to say that he is not a walking compendium of law on the subject of homesteads, and can not answer off-hand the numerous questions which are propounded to him on the subject. He will, however, publish in the "Queries" department of the JOURNAL such as appear to be important, and he will answer such as he may be able to answer without consuming too much time in searching the authorities. He must leave the rest to the readers of the JOURNAL.

Without examining the books for any analogous case, it would seem pretty clear that the statute of West Virginia quoted by the above correspondent, in so far as it attempts to limit the personal property exemption to cases arising *ex contractu*, is something more than a "regulation"—is an invasion of the constitutionel guaranty, and hence void. How it would be in case of a fine due the state, presents more difficulty, and we express no opinion as to that. But as to that portion of the statute which relates to the making and recording of a declaration of homestead, we have no doubt that it is a reasonable and proper "regulation," and not an infraction of the constitutional right—probably one of the very things which the convention had in view when it empowered the legislature to make "regulations" on the subject. Ed. C. L. J.]

7. Liability of Surety in Appeal Bond, how Affected by Bankruptcy of Principal.—Will the bankruptcy of the surety on appeal bond to remove a case from a lower to a higher court release the surety on the bond, though the case be decided against the principal in the appellate court after the bankruptcy of the surety? SUBSCRIBER.

8. Power of Justice to Require of Prosecuting Witness Security for Costs.—Has a justice of the peace any power under our statute (Missouri) to rule prosecuting witnesses in cases of felony, to give security for the costs, and, in default, discharge the prisoner? J. C. H.

Legal News and Notes.

—IMPRISONMENT FOR DEBT.—The bill to abolish imprisonment for debt by county courts in England, is to be read a second time on the 20th of June.

—A BILL has been introduced into the English Parliament which aims at giving counsel a right to recover their fees, and to render them liable for professional negligence. A number of petitions have been presented in its favor, mostly from solicitors in the country. The views of the barristers themselves, the interested parties, are as yet unknown.

—APROPOS of the Lawrence-Dana controversy, the English legal journals remark that the opinion of the profession as to the comparative merits of the two works may be gathered from the fact, that while second-hand copies of Mr. Lawrence's edition can be readily procured for thirty shillings, a copy of Mr. Dana's is but seldom met with, and is worth, in Chancery Lane, some three guineas. Both editions are now out of print.

—IT is told of Sig. Mancini, the new Italian minister of justice, as of a famous English barrister of a former generation, that on one occasion, having been called suddenly to defend a case, by a strange confusion he took up that of his adversary instead of that of his own client. After pleading with great power for some time, he was told of his mistake, stopped, said, "This is what my learned brother on the other side would urge," and, going on to disprove the arguments he had advanced, succeeded in gaining a verdict.

—A COUPLE of months ago Col. Bissell the proprietor of the Sherman House, Chicago, and his son, were burned to death in a railway accident in the east. The widow and mother has commenced suit against the railway company to recover damages for the death of her husband and son. The railroad company, it seems, intends defending the case on the ground (1) that the son was riding on a free pass; (2) that the father having escaped from the burning car returned to rescue the boy, and in so doing lost his life. The first defence will, we imagine, be of no avail in a legal sense. A railway company is liable for gross negligence even where the passenger injured has accepted a free pass. The last defence will probably be held good, but it will not speak very highly for the company that will shelter itself behind such a plea. In the English Court of Appeals lately the judges reluctantly non-suited a plaintiff, whose husband had been killed while attempting to save a woman who was in great danger, and who saved her life at the expense of his own, but expressed their opinion very strongly on the course of the company, and advised them, though unable to compel them, to pay all the costs. But of course a railway company is not a humane society.

—ST. LOUIS LAW SCHOOL.—The eighth annual graduation exercises of the law class of the Washington University (known as the St. Louis Law School), were held at St. Louis on the evening of the fifteenth of this month. Wm. G. Eliot, D.D., Chancellor, occupied the chair, and the address was delivered by ex-Senator Doolittle. The subject selected was the question of national and state sovereignty, and the office and duty of the Supreme Court of the United States in defining and holding the balance between the two systems. Judge Doolittle explained in a clear and forcible manner the powers conferred on the United States by the constitution, the rights remaining with the states, the limitations imposed on the federal power, and the nature of the sovereignty of each. He concluded with an able review of the decisions of the supreme court on these constitutional questions from 1803, to the late decision of Chief Justice Waite on the enforcement act. Nineteen pupils compose the graduating class of 1876, one of them, Mr. Cline, receiving the prize for the thesis, on the subject of "*Ultra Vires.*"

—COUNSEL for the defence in criminal cases will notice a favorable contrast between our own practice and that of the department of the Sarthe, in France, in a case which has just occurred, of a man who, being tried for a very serious offence, was asked by the presiding magistrate if he had anything to say for himself. This was asked just as the jury were about to retire to consider their verdict. The prisoner was about to say something, when his counsel told him in an undertone that he had better be silent. The prisoner was eventually found guilty; but before the proceedings terminated, the *Procureur General* demanded that a "disciplinary penalty" be inflicted on the counsel for the defence, on the ground that he had *manque aux convenances* in preventing the prisoner from telling what he termed the truth. Moreover, another barrister was called to account for having whispered to the counsel for the defence "*Vous avez bien fait*"—that he had done well in suggesting silence to his client. Such an intolerable abuse of authority on the part of an attorney-general or public prosecutor would never be sanctioned in this country, where the liberty of defence for a prisoner is protected to the highest possible degree, and the utmost licence compatible with decorum permitted to counsel, nor is that licence, we are glad to say, often abused. The fact is, however, noteworthy, as illustrating in a marked degree the feeling of foreign courts of criminal procedure in regard to a practice which is far from being at variance with our own laws.—[*The Law Times.*